89-1564

No. _____

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JAMES E. POOLE, JR., ET AL.,

Appellants,

v.

EMMA GRESHAM, ET AL.,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether a State Court Order which, in enforcing previously precleared state election law, enjoined or delays a pending election until such time as state election law is complied with, is subject to preclearance pursuant to Section 5 of the Voting Rights Act 42 U.S.C. 1973c, before such Order may be enforced.

PARTIES TO THE PROCEEDING

The following is a complete list of all parties to the action below which is sought to be reviewed: Emma Gresham, Turetha Neely, Clayton Neely, Jr., Sharon Anfield, Donald Wright, Melvin Streetman, Earl M. Neely, Mary L. Holland, Alvin Lewis, Sr., Nollie Mae Morris and Quinton Gresham, Plaintiffs; Michael J. Bowers, Attorney General of Georgia, Russell N. Sewell, Jr., Executive Counsel to the Governor of Georgia, State Election Board of Georgia, Max Cleland, Secretary of the State of Georgia and Chairman of the State Election Board, Burke County Board of Registrars, Weston Fortson, W. E. Bessent and John M. Moseley, Chief Registrar and members, respectively, of the Board of Registrars, Burke County Board of Elections, and Ralph B. Willis, Michael N. Searles and Morris Green, Chairman and members, respectively, of the Board of Elections, Defendants' James E. Poole, Jr., William C. Harmon, J. W. Marshall, Fred Muns, Louis B. Way and Julian Kight, Defendant-Intervenors.

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The opinion of the three Judge District Court of the Northern District of Georgia which appears in the appendix hereto as Exhibit 1 is reported at ___ F.Supp. ___ (N.D. Ga. 1989).

The previous decision of this Court which appears in the appendix hereto as Exhibit 2 is reported at ___ U.S. ___, 109 S.Ct. 523, 102 L.Ed.2d 556 (1988).

The June 30, 1988 Order and opinion of the three Judge District Court which was vacated by this Court and which has now been reinstated appears in the appendix hereto as Exhibit 3 and is reported at 695 F.Supp. 1179 (N.D. Ga. 1988).

The opinion and Order of the Superior Court of Burke County, Georgia, enforcement of which has been enjoined by the three Judge District Court Orders referenced above, appears in the appendix hereto as Exhibit 4. The Superior Court Order is unreported.

JURISDICTION

This is an appeal from a Three Judge District Court which rendered a judgment dated December 28th, 1989, filed January 3, 1990, which judgment reinstated a June 30, 1988 Order granting a permanent injunction. The judgment was entered on the Court docket on January 9th, 1990. The June 30th, 1988 Order had previously been vacated by this Court.

A notice of appeal to this Court was duly filed in the United States District Court for the Northern District of

Georgia on February 1, 1990. A copy of the notice of appeal is included in the appendix hereto as Exhibit 5. The notice of appeal was filed within 30 days of the entry of the judgment hereby appealed.

This appeal is being docketed in this Court within sixty (60) days from the date of the filing of the notice of appeal in the United States District Court for the Northern District of Georgia and within ninety (90) days from the date of the judgment entered by the Three Judge District Court for the Northern District of Georgia.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1253. Jurisdiction is also specifically conferred pursuant to 42 U.S.C. 1973c.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. 1973c. *Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.*

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title

based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such

submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmation indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

28 U.S.C. 1253 *Direct appeals from decision of three-judge courts.*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a District Court of three judges.

O.C.G.A. 21-3-125 *Qualification of voters; registration of voters purged from list of electors; determination by governing*

authority of method by which registration lists are to be maintained; manner of registration of electors in municipalities maintaining own registration lists.

(a) No person shall vote in any primary or election unless he shall be:

(4) A resident of the municipality in which he seeks to vote, notwithstanding any provision of any municipal charter to the contrary; . . .

(remainder of statute set out in appendix as Exhibit 6).

O.C.G.A. 36-30-13 *Special election to fill vacancies on municipal governing authority when all seats are vacant.*

Except as provided in subsection (g) of Code Section 21-4-12, in the event that all seats on the governing authority of a municipality are vacant, the election superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The board of registrars for the county shall prepare the electors list for the special election.

STATEMENT OF THE CASE

The municipality of Keysville, Georgia was incorporated by Act of the Georgia General Assembly on December 29, 1980. At the time of its incorporation, its municipal boundaries were defined as follows: "The corporate limits of said town shall extend one-half mile in every direction from the schoolhouse now located in said

town of Keysville". Ga.Laws 1890-91, Vol. II, 657. The boundaries of the town of Keysville have never been changed subsequent to their designation in the Act of Incorporation.

Pursuant to its Act of Incorporation, the municipal government of Keysville consists of a mayor and five council members elected on the first Monday in January of each year. The municipal governing authority of the town of Keysville was elected, served and functioned from 1891 until approximately 1933 when, for some reason presently unknown, the town ceased holding municipal elections. No municipal elections were held for the town of Keysville, Georgia from approximately 1933 until 1988. The municipal governing authority did not function from approximately 1933 until 1988.

In approximately 1895, the schoolhouse referenced in the Act of Incorporation and from which the municipal boundaries of the town were measured, was destroyed. The Superior Court of Burke County, Georgia has determined that it is now apparently impossible to properly designate the municipal boundaries of the town of Keysville in accordance with their delineation in the town's Act of Incorporation and with sufficient clarity for purposes of a municipal election. Evidence as to the former location of the schoolhouse is substantially conflicting. The Burke County Superior Court has determined that "the best that can be done is to generalize areas where the lot (on which the schoolhouse was located) might have been located". (See Exhibit 4, Burke County Superior Court Order dated December 31, 1987). The same Order also determined that any move in the generalized location of the old schoolhouse, which would be the center of

town, would substantially affect the number of persons who would be entitled to vote in any election for the municipal offices of the town of Keysville. Another Georgia Superior Court Judge presiding over a statutory post-election, election contest, which was filed to challenge the results of the January, 1988 Keysville municipal elections, concluded that: [t]his Court finds that the municipal boundaries of the City of Keysville remain undetermined and uncertain. Based upon the evidence and proceedings to date, it is evident that the boundaries, as conceived by the drafters of the 1890 Act of Incorporation, will never be determined to any degree of accuracy". (See May 23, 1988 Order of Superior Court Judge William F. Grant included in the appendix hereto as Exhibit 7).

In 1985, notwithstanding the problems in locating and delineating the boundaries of the town of Keysville, certain residents of the town undertook preliminary preparations to reactivate the town government by attempting to schedule new municipal elections. Before these elections could take place, the Appellants herein filed a petition in the Superior Court of Burke County, Georgia seeking to restrain and enjoin those elections scheduled for January 6th, 1986 on the grounds that the elections were not being held in compliance with previously precleared state election law. On January 17, 1986, the Superior Court issued a preliminary injunction enjoining the scheduling or conducting of municipal elections for the town of Keysville until all previously precleared state municipal election laws were met and complied with.

In 1987, the Georgia General Assembly enacted Georgia Laws 1987, p. 1978, O.C.G.A. 36-30-13, which provided a method for holding elections to fill seats on the

governing authority of a municipality when all such seats were vacant. The law did not in any way, however, address the municipal boundary issue for the town of Keysville. The Burke County Election Board, thereafter and pursuant to the Act referenced above, called a municipal election for the town of Keysville. The election was scheduled to be held on January 4, 1988. The call for the election was subsequently submitted by the Burke County attorney as chief legal officer of Burke County, Georgia, to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, for the purpose of preclearing the scheduled elections.

On September 4, 1987, the Burke County attorney made his original preclearance submission to the Assistant Attorney General for the municipal elections scheduled for January of 1988. At the time of making the original submission, the Burke County attorney noted that "there is also controversy among the parties relative to the boundaries of said municipality". His letter concluded that "we anticipate the Courts will establish the boundaries and order an election"; however, no Court establishment of Keysville boundaries was ever had, nor was any election ordered. On November 5, 1987, the Burke County attorney followed up his original submission with another letter to the Assistant Attorney General and included with that letter a copy of a map which purported to designate the boundaries of the town of Keysville. This designation had been arbitrarily made by a tax commissioner of Burke County, Georgia who has since discovered deeds which lead him to believe that the boundaries were improperly designated. The Appellants

herein who were at that time Plaintiffs in the then pending election challenge were never notified of these pre-election preclearance submissions.

On December 3, 1987, the Appellants herein filed, in the Burke County Superior Court, a motion to enjoin the County Election Board and Board of Registrars from conducting the scheduled January 4, 1988 elections on the grounds that the boundaries of Keysville had not been determined and consequently, the residents of the town could not be identified. The Superior Court held a hearing on this motion on December 30, 1987 and entered an Order on December 31, 1987 enjoining the January 4, 1988 elections. The Superior Court specifically found that the boundaries which had been submitted for preclearance to the United States Attorney General were not, in fact, the boundaries of the town of Keysville as defined by State law. The Court's injunction was enforcing previously precleared Georgia Municipal Elections law which required residency within a municipality as a requirement for participation in a municipal election (O.C.G.A. 21-3-125).

The Superior Court concluded that being unable to delineate the boundaries of the town, the Election Board would likewise be unable to determine the residents of the town for purposes of participating in such an election. The Court also specifically determined that entry of its Order did not enact or seek to administer any standard practice or procedure with respect to voting different from that in force or effect on November 1, 1964 and, therefore, the Order was not subject to Section 5 preclearance.

On December 31, 1987, the Plaintiff Appellees herein filed a motion in the District Court for the Northern District of Georgia seeking to enjoin enforcement of the State Court's Order referenced above pending its preclearance by the United States Attorney General pursuant to Section 5 of the Voting Rights Act. A preliminary injunction was entered on that same day and subsequently, a three judge District Court was convened for the purpose of hearing the Plaintiff Appellees' motion and considering a request for a permanent injunction. On June 30, 1988, the three judge District Court entered a permanent injunction enjoining enforcement of the Superior Court's Order until such time as it had been precleared by the United States Attorney General, pursuant to Section 5 of the Voting Rights Act. Municipal elections were held for the town of Keysville on January 4, 1988. In December, 1988, this Court vacated the permanent injunction entered by the three judge District Court and remanded the case for consideration of the issue of mootness. *Poole, et al., v. Gresham, et al,* ___ U.S. ___, 109 S.Ct. 523, 102 L.Ed.2d 556 (1988). The three judge District Court entered an Order on December 28, 1989 finding that the case was not moot and reinstating their June 30, 1988 permanent injunction. This appeal is taken from reentry of that injunction.

THE QUESTIONS ARE SUBSTANTIAL

I.

A State Court Order enforcing previously precleared state election law and not changing any voting practice, standard or procedure is not subject to Section 5 preclearance before it may be enforced.

Although the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, have been applied to a variety of voting practices or procedures, never have the provisions of that Act been applied to require a state court order enforcing previously precleared state election law to be precleared before the state court order might be enforced. No Court has ever determined that a change in voting procedures subject to preclearance occurs when a state court enters an injunction delaying elections until a municipality complies with previously precleared state election law.

All election changes which have been determined to be subject to preclearance, change in some substantive way the manner in which elections are or would thereafter be held. As this Court recognized in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), Congress, in enacting the Voting Rights Act, "intended to reach any state enactment which altered the election law of a covered state". *Id.* at 566. The only election "alteration" brought about in this case by the State Court's attempted enforcement of municipal residency requirements is a delay of the election from the date originally scheduled to some subsequent date when the requirements of state law had been complied with. Such "change", however, does not

alter election procedures nor the way in which elections would thereafter be held.

The Court below reasoned that by enjoining the January, 1988 elections, the State Court of necessity changed the date on which the elections would be held and that such change in the date of the election requires preclearance approval by the Attorney General pursuant to Section 5. While permanent changes in the dates of elections may require preclearance, no such temporary delay, which delay is necessitated in enforcing other previously precleared state election law should require preclearance.

The ruling of the court below which required preclearance of the State Court Order would, when carried to its logical extreme, in effect, completely remove from state courts the ability to enforce their own state election laws if, in enforcing those laws, an election was delayed. As a consequence of this ruling, no state court could ever require correction of pre-election irregularities or otherwise compel compliance with state or federal election law if such correction required delay of a then scheduled election.

In this case, the state court order in question affects voting practice or procedure only to the extent that it seeks to enforce residency requirements of a statute which has been precleared. In *Williams v. Sclafani*, 444 F.Supp. 895 (S.D. N.Y. 1977), the court held that "Section 5 was not intended to cover a change in . . . practice . . . brought about by a state court decision construing or interpreting an already precleared state voting statute". *Id.* at 903.

Should this Court allow the decision of the three judge Court to stand, state courts hereafter, when faced with an obvious violation of previously precleared state election law, would be unable to enforce their own laws, but rather be required to sit idly by and let elections proceed even if these elections were in obvious violation of state law. Such was not the intent of the Voting Rights Act nor has this Court ever suggested that Section 5 requires such preclearance.

Requiring preclearance of the State Court Order here in question, which Order requires no substantive election law changes, basically would completely challenge the integrity of state court orders. State court orders would be forced to be reviewed by Department of Justice staff personnel before they could be enforced. A first year law school graduate working in the Justice Department could be called upon to make recommendations and, perhaps, determinations as to whether a sitting State Court judge in a far removed state and locality chose the right remedy for election wrongs which were identified by the State Court.

Required preclearance under circumstances such as this can also leave complainants such as the Appellants herein with non-remediable wrongs. In this case, neither the Appellants herein nor the State Court Judge who has issued the Order here in question have the authority to submit the State Court Judge's Order for preclearance. The Appellants herein, on January 21, 1988, attempted to submit Judge Pickett's Order for preclearance although indicated in their letter of attempted submission that they did not think the Order was subject to such preclearance.

The Justice Department refused to consider such submission, indicating that the Appellants were not parties entitled to make a submission pursuant to the regulations governing such submissions. In addition, Judge Grant, the Superior Court Judge presiding over the election contest hereinabove referenced (see Exhibit 7), requested that the State Attorney General submit Judge Pickett's Order for preclearance; however, the Attorney General, by letter dated July 8, 1988 to Judge Grant, refused to submit the Order for preclearance. The only other persons entitled, pursuant to existing regulations to present such Order for preclearance submission, would be Burke County or Keysville, Georgia governing officials and, obviously, inasmuch as any such submission would be contrary to their interest as evidenced in this litigation, those officials have, likewise, refused to submit the Order for preclearance. Accordingly, it is entirely possible that required preclearance of an Order such as this could never be attempted because of the refusal of authorized persons or entities to submit the Order to the Justice Department for preclearance. In addition, as pointed out more fully hereafter, the standards pursuant to which any such submission would be considered are not applicable to situations such as this where there is no ordered change in substantive election procedures.

The decision of the three judge court would basically require the Attorney General or the Department of Justice to act as an administrative Appellate Court in reviewing state court orders such as the Order here in question. This would prove to be extremely difficult, if not impossible, in situations such as that present here when there is no substantive election change that has been ordered. The

far reaching effects and implications of a decision such as this deserve this Court's full consideration with briefing and oral argument.

II.

The State Court's Order implements no change in voting which is subject to preclearance pursuant to Section 5.

The Court below relied heavily on this Court's decision in *Hathorn v. Lovorn*, 457 U.S. 256 (1982) in support of their decision. The *Hathorn* case, however, dealt with a Mississippi Court Order which required compliance by a school board with certain election procedures that had been set out in a state statute, which statute had been ignored and unenforced by the school board since the statutes' enactment in 1964. It is unquestioned that the underlying statute which was sought to be enforced in *Hathorn* was, in and of itself, subject to preclearance pursuant to Section 5 and that the statute had not been precleared at the time the Mississippi Courts sought to order its enforcement. As Justice O'Connor noted in the opinion of this Court in *Hathorn*, certiorari was granted to decide "whether a state court may order implementation of a *change in election procedure* over objections that the change is subject to preclearance under Section 5 of the voting Rights Act of 1965". *Id.* at p. 257 (emphasis added). As pointed out by Justice O'Connor, it is not the state court order itself that this Court required to be precleared, but rather the underlying "change in election procedure" that would have been brought about by enforcement of the state court order.

In this case there is a complete absence of any ordered change of election procedure. As noted earlier, the only change is the delay of a previously scheduled election. No changed election procedure would be effected by enforcement of the Burke County Superior Court Order.

Hathorn is also distinguishable in that, as noted in this Court's decision, no one disputed that the changes in election procedures ordered by the Mississippi Courts were "procedures" subject to preclearance pursuant to Section 5. As noted on remand, "[t]he controversy precipitating this legal battle centered around whether the method of selecting the school board would be changed". *United States v. Louisville Municipal Separate District, Board of Trustees*, 557 F.Supp. 1168, 1169 (N.D. MISS. 1983). In this case, no such "change" was ordered by the Superior Court. Had the Superior Court's Order in this case dictated that all Keysville municipal elections would, thereafter, be held on a different date, that Order would be subject to preclearance. The obvious distinction in the facts of this case, when compared with the facts in *Hathorn*, is that the Mississippi Courts in *Hathorn* sought to order a change in election procedure, whereas the Court in this case sought only to enforce previously precleared state law. The Court's Order here in issue does not in any way alter the election law or procedure of Keysville.

As noted by this Court in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), in order for preclearance to be required, there must be a "new procedure with respect to voting", which procedure "is different from the procedure in effect when the state became subject to the Act". *Id.* at 570. No such new procedure would be

brought about by enforcement of the State Court injunction. All elections occurring in Keysville after the injunction would be held pursuant to the same "standards, practices or procedures" as existed before enforcement of the injunction.

III.

There is no changed voting standard, practice or procedure which could be considered by the Attorney General or a reviewing Court, nor any standards which could be used by the Attorney General or a reviewing Court for considering preclearance of the Burke County Superior Court Order, if such preclearance is required.

The Attorney General has promulgated regulations setting out the factors that the Attorney General considers relevant and the standards by which the Attorney General will be guided in making any Section 5 determinations and in defending Section 5 declaratory judgment actions. See 28 C.F.R. 51.51, *et seq.* Generally, as set out in those regulations, the Attorney General, when considering any submission for preclearance, seeks to determine whether the submitted change has the purpose of or will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. As set out in 28 C.F.R. 51.57, the relevant factors used by the Attorney General in making determinations with respect to submitted changes are as follows:

> (a) The extent to which a reasonable and legitimate justification for the change exist;
>
> (b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.

In light of the standards set out above, it is obvious that the Attorney General has never envisioned being required to preclear a Superior Court's Order which enforces previously precleared state law. Under the facts in *Hathorn*, however, it would be easy to see where the Attorney General could use the above cited standards in determining whether the underlying statute which the Mississippi Courts ordered enforced should or should not be precleared.

By requiring preclearance of the State Court Order here in question, the Attorney General would basically be called upon to second guess a state court judge and the remedy which the judge chose to use in enforcing precleared election law. It would seem impossible for the Attorney General to determine whether in this case legitimate justification existed for the Burke County Superior Court's Order. Any such determination would obviously be a duty of an appellate court, not an administrative agency such as the Department of Justice. It would also be impossible, if not unconstitutional, for the Attorney General to consider the extent to which the Burke County Superior Court had afforded members of racial and language minority groups an opportunity to participate in its decision. It is ludicrous to suggest that a Court would or should, under any set of circumstances, allow such

participation in the judicial decision making process. Finally, it cannot be rationally argued that the Burke Court Superior Court's Order should be evaluated by the Attorney General in light of the extent to which the Court "took the concerns of members of racial and language minority groups into account" in making the decision. 28 C.F.R. 51.57(b).

As noted from the above, there is in this case an obvious absence of any change in election procedure that could be evaluated by the Attorney General or the District Court for the purpose of determining whether to preclear the State Court's Order.

IV.

CONCLUSION AND SUMMARY

The Burke County Superior Court's Order of December 31, 1987 is an Order merely seeking to enforce previously precleared State election law. The Order does not alter, amend or change any election standard, practice or procedure and all elections which would be carried out in the municipality of Keysville subsequent to the Court's December 31, 1987 Order, would be carried out in accordance with the same standards, practices or procedures as existed prior to the Court's Order.

The Superior Court Order merely seeks to enforce a municipal residency requirement of Georgia state election law and to require that an accurate determination of municipal residency be made in accordance with state law before elections can be held. The residency requirement of Georgia municipal election law is a legitimate

requirement, consideration of which this Court has long recognized and authorized.

Allowing the Order of the three judge District Court below to stand would, in essence, severely restrict a State Court's ability to enforce its already precleared election law. The Order also would require the Department of Justice to act, in effect, as an administrative appellate court. It is obvious that the standards by which the Attorney General uses to determine preclearance are not at all appropriate for reviewing Court Orders which in no way change election practices or procedures, but which merely enforce previously precleared state election law. The far reaching implications of the Order issued by the three judge Court require this Court's full review and attention. For the reasons set forth above, Appellants respectively request that this Court reverse the ruling of the three judge District Court.

Respectfully submitted,

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State Bar No. 204250

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA GRESHAM, et al.,	:	CIVIL
Plaintiff,	:	ACTION NO.
	:	1:87-CV-867-JOF
vs.	:	
JOE FRANK HARRIS, et al.,	:	(Filed
	:	Jan. 3, 1990)
Defendant.	:	
	:	

PER CURIAM:

While it may be the effect of Judge Grant's order[1] and the decision of the Board of Registrars to fix the boundaries for the town of Keysville, it is not at all clear to us that Judge Pickett will find that they have been "properly delineated in accordance with the requirements of law." *Poole v. Lodge*, No. 85-414, Slip Op. at 16, (Super. Ct. Burke County December 31, 1987). We conclude, therefore, that this controversy is not moot. We hereby reinstate our order of June 30, 1988 granting plaintiffs a permanent injunction.

SO ORDERED this 28th day of December, 1989.

/s/ J. L. Edmondson
J. LARRY EDMONDSON
UNITED STATES
CIRCUIT JUDGE

---

[1] *In re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988*, No. 88-21 (Super. Ct. Burke County May 23, 1988).

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES
DISTRICT JUDGE

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

ENTERED ON DOCKET
JAN 9 1990
L.D.T. CLERK
By /s/ L. Kendrick
DEPUTY CLERK

EXHIBIT 2

Supreme Court of the United States

No. 88-539

James E. Poole, Jr., et al.,

Appellants,

v.

Emma Gresham, et al.

APPEAL from the United States District Court for the Northern District of Georgia.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss or affirm

ON CONSIDERATION WHEREOF, it is ordered by this Court that the judgment herein be, and it is hereby vacated with costs, and that this cause is remanded to the United States District Court for the Northern District of Georgia to consider the question of mootness.

IT IS FURTHER ORDERED that the appellants, James E. Poole, Jr., et al., recover from Emma Gresham, et al., Two Hundred Dollars ($200.00) for their costs here in expended.

December 5, 1988

Clerk's costs: $200.00

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA GRESHAM, et al.,	:	CIVIL
	:	ACTION NO.
Plaintiffs,	:	1:87-CV-867-JOF
vs.	:	
	:	(Filed
JOE FRANK HARRIS, et al.,	:	June 30, 1988)
	:	
Defendants.	:	
	:	

ORDER

This action under the Voting Rights Act is before the three-judge court on the plaintiffs' motion for a permanent injunction. The plaintiffs seek to extend this court's preliminary injunction, which enjoined the defendants from implementing any voting changes directed by the Burke county Superior court in its December 30, 1987 order absent pre-clearance under section 5 of the Voting Rights Act. For the reasons discussed below, the plaintiffs' motion for a permanent injunction will be granted.

I. FACTS AND PROCEDURAL HISTORY.

The following facts were stipulated by the parties at the January 14, 1988 hearing before the three-judge court.

1. The plaintiffs are black registered voters and residents of Burke County, Georgia.

2. The town of Keysville was incorporated in 1890 pursuant to Georgia Law 1890-91, Volume II, p. 657.

3. The boundaries of Keysville were fixed by the Legislature and extend "one-half mile in every direction from the schoolhouse which is now located in said town of Keysville." *Id.* The boundaries of the town have never been changed subsequent to their designation in the original act of incorporation by legislative act or municipal annexation.

4. The schoolhouse referred to in the 1890 Georgia law was destroyed and its exact location is in dispute.

5. There are approximately 165 registered voters in the town of Keysville (as defined by the boundaries used by Burke County officials for the January 4, 1988 elections), of whom the majority are black.

6. Pursuant to its act of incorporation the municipal government of Keysville consists of a mayor and five council members elected on the first Monday in January 1891 and on the same day annually thereafter for one-year terms of office.

7. Keysville is a current municipality of the State of Georgia. However, until January 4, 1988 there had been no elections for the mayor and council and no municipal office holders since approximately 1933.

8. For several years the plaintiffs and other black residents of Keysville tried to reactivate the municipal government of Keysville and elect a mayor and council.

9. In 1985, the Burke County attorney, on behalf of Keysville residents, requested the State Attorney General to advise him how to reactivate the municipal government. The Attorney General responded by letter dated August 2, 1985.

10. The Georgia Municipal Election Code, O.C.G.A. Section 21-3-408(b), provides that in the event of a vacancy in any municipal office, and if, as in Keysville, the municipal charter fails to provide a method for the filling of such vacancy, "the governing authority shall thereupon call a special election to fill such vacancy."

11. All municipal elections are conducted by "the superintendent, registrars, deputy registrars, poll officials and other employees" selected by the governing authority. O.C.G.A. Section 21-3-8(3).

12. Since the offices of the governing authority for Keysville were vacant, and pursuant to the advice of the Attorney General, the plaintiffs and other residents of Keysville conducted a town meeting on September 5, 1985, after which plaintiff Turetha Neely and Upton Cochran were given an oath of office as putative co-superintendents of election by the probate judge of Burke county, and called a special election for the mayor and council for January 6, 1986.

13. Plaintiff Emma Gresham qualified for mayor and plaintiffs Clayton Neely, Jr., Anfield, Wright, Streetman, and Earl M. Neely qualified for the council. None of these candidates had any opposition and, after the closing of the qualifying time but before the scheduled election, all were declared elected and were administered the oath of office by the probate judge on December 30, 1985.

14. On the same day, five white citizens of Keysville, who are the intervenors in this case, sought and were granted a temporary restraining order by the Superior Court of Burke County enjoining plaintiff Turetha Neely, the Board of Registrars of Burke County, and

others from holding the elections on January 6, 1986 on the grounds that the elections were not being held in conformity with state law.

15. On January 17, 1986, the superior court issued a preliminary injunction enjoining the scheduling or conducting of any municipal election for Keysville until all the requirements of state law were met.

16. It was not possible for elections for the mayor and council to be conducted in literal conformity with the Georgia Municipal Election Code since the offices of the governing authority, which has the duty of calling elections and selection election officials, were vacant.

17. The plaintiffs requested the members of the Georgia General Assembly who represent Burke County to introduce and enact legislation reactivating the government of Keysville, but the legislators refused.

18. Pursuant to Article V, Section II, para. VII of the Constitution of Georgia, "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law."

19. The plaintiffs and other residents of Keysville requested the Governor to exercise his constitutional authority and appoint persons to the mayor and council of Keysville, but the Governor upon the advice of his Executive Council and the Attorney General refused to do so.

20. The Georgia General Assembly enacted Georgia Laws 1987, p. 178, which was precleared by the Attorney General of the United States and became effective on July 1, 1987, providing that:

> in the event that all seats on the governing authority of a municipality are vacant, the elections superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The Board of Registrars for the county shall prepare the electors list for the special election.

O.C.G.A. Section 36-30-13.

21. The office of the Attorney General of Georgia wrote to the Secretary of State concerning O.C.G.A. Sections 36-30-13 dated August 7, 1987.

22. The Burke County election board, pursuant to Section 36-30-13, called an election for January 4, 1988 to fill the vacancies in the municipal government of Keysville. The call for the election, together with a map designating the boundaries of the town and showing the area from which persons would be allowed to vote, were prepared by Burke County officials and submitted to the Attorney General of the United States pursuant to section 5. The submission was precleared on December 9, 1987.

23. On December 3, 1987, the plaintiffs in *Poole v. Lodge*, Civil Action No. 85-V-414, a group of white residents of Burke County, filed a motion to enjoin the county election board and board of registrars from conducting the January 4, 1988 elections on the ground that the boundaries of Keysville had not been determined.

24. The superior court held a hearing on the motion on December 30, 1987 and, in an order entered December 31, 1987, enjoined the January 4, 1988 elections. The court

also enjoined the defendants "from taking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly determined in accordance with the requirements of law."

25. On December 30, 1987 the plaintiffs filed a motion for a temporary restraining order and preliminary injunction in this case to enjoin the defendants from implementing the voting changes contained in the state court order absent preclearance under section 5. Judge Forrester, sitting as a single judge court, held a hearing on the motion on December 31, 1987, at which counsel for the county and state defendants indicated that the voting changes contained in the state court orders were required to be precleared under the Voting Rights Act prior to being implemented.

26. Following the hearing, Judge Forrester granted the plaintiffs' motion to join the Burke County Board of Elections and the Board of Registrars as additional party defendants, ruled that the voting changes contained in the state court order were subject to section 5, granted the motion for a temporary restraining order, and enjoined the defendants from failing to conduct the precleared January election.

27. The election was held as scheduled on January 4, 1988. Four blacks and one white were elected to the city council and a black was elected mayor.

On January 13, 1988, Judge Roney, Chief Judge of the Eleventh Circuit, designated Circuit Judge J. L. Edmondson and District Judge Robert H. Hall to serve with Judge Forrester as members of a three-judge court to hear

and determine the action pursuant to 28 USCA Section 2284(b)(1). The motion by James E. Poole, Jr., William C. Harmon, J. W. Marshall, Fred Muns, Louie B. Way, and Julian H. Kight to intervene was granted.

The three-judge court held a hearing on January 14, 1988 on the plaintiffs' motion for a preliminary injunction. Based upon the foregoing evidence and after hearing oral argument, the court granted the preliminary injunction, reasoning that a state court may change a precleared election date or halt a precleared election only if the court first obtains preclearance of its order. The parties consented to the use of the record developed at the hearing as the basis for the court's ruling on the plaintiffs' motion for a permanent injunction. The court directed the parties to submit post-hearing briefs and took the plaintiffs' motion for a permanent injunction under advisement.

II. DISCUSSION.[2]

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[2] Though the intervenors [sic] objected at the January 14 hearing that venue in the Northern District is improper under 28 USC 1391 – because arguable the claim arose in the Southern District and the Burke County defendants reside there – it is not necessary for the court to decide which district is the proper venue for this case. First, venue is a personal privilege that cannot be raised by one party on behalf of another, *Camp v. Gress*, 250 U.S. 308, 316 (1919), and that is waived if it is not raised. *See, e.g., Leroy v. Great Western United Corporation*, 443 U.S. 173, 180 (1979). The Burke County defendants stipulated at the hearing that they do not object to this venue. Second, an intervenor cannot object to venue. *See, e.g.*, 3B *Moore's Federal Practice* para. 24.19 at 24-901. Finally, the intervenors here appear to have dropped the objection, since they do not raise it in their post-hearing brief.

Section 5 of the Voting Rights Act, found at 42 USC 1973c, requires that any state or political subdivision covered by the Act submit to federal scrutiny "any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The requisite "preclearance" may be obtained in one of two ways:

> First, the State or political subdivision may institute an action in the District Court for the District of Columbia for a declaratory judgment that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; second, it may submit the proposed change to the Attorney General. No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him. Attempts to enforce changes that have not been subjected to section 5 scrutiny may be enjoined by any three-judge district court in a suit brought by a voter or by the Attorney General on behalf of the United States.

United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642, 645 (1977) (citations omitted).

It is undisputed in this case that the superior court order at issue applies to a political subdivision covered by the Voting Rights Act and that the order has not been precleared. The parties agree that the superior court order, if it enacts a change in voting procedure within the terms of section 5, must be precleared. *See Hathorn v. Lovorn*, 457 U.S. 256 (1982). In deciding this section 5 action, this court does not sit to determine whether the superior court order does or does not have the purpose or

effect "of denying or abridging the right to vote on account of race or color" or to determine the validity of the superior court's interpretation of Georgia law. The only question before this court is whether the superior court order effects a change in voting requirements that must be precleared under section 5 before being enforced.

The intervenors [sic], the only parties opposing preclearance of the superior court order, advance several arguments against extending the preliminary injunction into a permanent injunction. None of the intervenors' [sic] arguments are persuasive. First, the intervenors [sic] argue that the superior court order did not effect a change in voting requirements under section 5 because the order changed neither the boundaries of Keysville nor the manner of holding elections there, because it did not institute a practice different from that in effect on November 1, 1964, because the January 4, 1988 election had not yet occurred and was therefore not yet a practice, and because the Attorney General had no previous practice with which to compare the superior court order.

Whether or not the superior court order changed the boundaries of Keysville, it is clear that the order did, at the least, change the date of the election, if not halt it altogether. A change in the date of an election, even if effected merely to comply with a statute that had already received clearance, requires approval by the Attorney General under section 5. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985). The fact that the superior court order did not purport to change the

boundaries of Keysville is irrelevant since the date change alone was sufficient to require preclearance.[3]

Contrary to the intervenors' [sic] textual argument, i.e., that the superior court order effected no voting change since the practice in Keysville on November 1, 1964 was the same as that resulting from the superior court order, the benchmark for determining whether voting practices have changed is the most recent precleared practice if that practice post-dates November 1, 1964. *See NAACP, DeKalb County Chapter v. State of Georgia*, 494 F. Supp. 668, 677 (N.D.Ga. 1980) (three-judge court); 28 CFR section 51.54(b) ("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction."). As the court noted in *NAACP*, "the exact language of the statute would support" the intervenors' [sic] reading of section 5, but that reading "would lead to a result tantamount to repeal of the Act." 494 F. Supp. at 677.

Second, the intervenors [sic] argue that the superior court order is merely a judicial decision enforcing previously precleared election law, specifically Georgia's residency requirement. Since the court determined that the town's boundaries were indeterminate, the argument goes, it could not be said that the electors identified by the county officials were residents of Keysville. In arguing that judicial decisions construing precleared election law need not be precleared themselves, the intervenors [sic] rely heavily on *Williams v. Sclafani*, 444 F. Supp. 895

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[3] It should also be pointed out that the preclearance itself had not changed the boundaries of Keysville either.

(S.D.N.Y. 1977) (three-judge court).[4] In *Williams*, the New York City board of Elections informed a plaintiff candidate that persons registering on the street pursuant to New York's recently enacted mail registration statute could simultaneously sign his designating petitions. In a subsequent suit in state court, the state supreme court held that the City Board's interpretation was erroneous and invalidated a number of the signatures on the plaintiff candidate's designating petitions. The district court held that "section 5 was not intended to cover a change in . . . practice . . . brought about by a state court decision construing or interpreting an already precleared state voting statute." *Id.* at 903. The intervenors [sic] argue that in this case, just as in *Williams*, the state's precleared election law was misinterpreted initially and that the state court's correction of the misinterpretation is not a change in practice that must be precleared.

Williams has no application to this case. First, the holding in *Williams* was based largely on that court's conclusion that all state court decrees are outside the coverage of section 5. *Id.* at 903-04. That holding was repudiated by the Supreme Court in *Hathorn v. Lavorn*, 457 U.S. 255.

We note that the foundation of the intervenors' [sic] argument on this point is questionable. Careful analysis of the superior court order shows that the superior court did not construe the residency requirement – nor did it rule that the county officials lacked the authority under the statute to determine Keysville's boundaries – but

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[4] This decision is not a precedent binding upon this court.

instead held that, as a matter of fact, Keysville's boundaries could not be determined at all. That determination itself might be a change from the county officials' precleared conclusion that Keysville's boundaries could be determined.

Second, the intervenors [sic] argue that requiring preclearance of the superior court order, "by logical extension," will lead to pernicious results. The intervenors [sic] argue that if preclearance is required here, it should also be required of any state court order entered in an election contest that changes election results or requires new elections. That question is not before us and need not be decided here. We do, however, note a difference between the two situations: results of elections are not normally precleared. A successful election contest that effects a change in election results may not need to be precleared if the election contest itself were conducted pursuant to precleared election law on election challenges. In such a situation, cases such as *Williams* may continue to have some application. The intervenors [sic] also argue that requiring preclearance in cases such as this allows state officials, who would normally be without power to do so, to change municipality boundaries by submitting new boundaries for preclearance to the Attorney General. As the plaintiffs point out, however, it is highly unlikely that this course of events would ever occur and, if it were to happen, the improper but precleared boundaries may easily be changed by again submitting proper boundaries for preclearance.

Finally, the intervenors [sic] argue that if the superior court order must be precleared before being given effect, so that the January 4, 1988 election must be allowed to

stand, the intervenors [sic] are without an adequate remedy for what they perceive to be a violation of state election law. Simply because the intervenors [sic] may not prevail in their post-election contest, presently pending in the state courts, however, does not render that remedy inadequate. Moreover, the intervenors [sic] remain free to petition their legislators to remedy the situation by legislatively defining the boundaries of Keysville.

III. CONCLUSION

In summary, the court concludes that its ruling on the plaintiffs' motion for a preliminary injunction was correct. The superior court order changed a previously precleared practice and therefore should also have been precleared. The plaintiffs' motion for a permanent injunction is GRANTED and the defendants are permanently enjoined from departing from the voting practices precleared by the Attorney General without obtaining preclearance for any subsequent changes, by judicial order or otherwise.

IT IS SO ORDERED this 30th day of June, 1988.

/s/ J. L. Edmondson
J. L. EDMONDSON
UNITED STATES
CIRCUIT JUDGE

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES
DISTRICT JUDGE

/s/ J. Owen Forrester
J. OWEN FORRESTER

UNITED STATES
DISTRICT JUDGE

EXHIBIT 4

IN THE SUPERIOR COURT OF BURKE COUNTY,
STATE OF GEORGIA

JAMES E. POOLE, JR., First Plaintiff, et al. v. HERMAN LODGE, Individually and as a member of the Burke County Board of Commissioners, First Defendant, et al.	CIVIL ACTION NO. 85-V-414 COURT'S ORDER ON PLAINTIFFS' MOTION FOR CONTEMPT, MOTION TO ADD A PARTY DEFENDANT AND MOTION TO EXPAND THE EXISTING INJUNCTION

The Plaintiff's Motion for Contempt, Motion to Add a Party Defendant and Motion to Expand the Existing Injunction having come before the Court for hearing on Wednesday, December 30th, 1987, the Court, after hearing the evidence, does hereby enter the following findings of fact and make the following conclusions of law.

FINDINGS OF FACT

The Court finds that pursuant to the provisions of Act 160 of the 1987 Georgia General Assembly, Ralph B. Willis, as Superintendent of the Burke County Board of Elections, recently began making preparations for the holding of a special election bor [sic] the municipality of Keysville, Georgia to fill the vacancies which presently exist with regard to the council and mayoral seats for Keysville, Georgia. In order to assist in his preparation

for the election, Mr. Willis was provided with a map purporting to delineate the municipal boundaries for the town of Keysville, Georgia. The map had been prepared by James H. Bailey, the Chief Tax Appraiser and Tax Assessor for Burke County, Georgia. The purported municipal boundaries as prepared by Mr. Bailey were shown on a Burke County tax map. Mr. Bailey prepared the map delineating the purported boundaries of Keysville after undertaking research in the Burke County record room attempting to locate the center of town.

Pursuant to the Act of Incorporation incorporating the town of Keysville, which Act was approved December 29th, 1890, the boundaries of the town were defined as extending "one-half mile in every direction from the schoolhouse now located in said town of Keysville". Mr. Bailey testified that in examining the Burke County records, he had discovered information which "I felt like indicated where the center of town was at". The deeds upon which Mr. Bailey testified that he relied in seeking to locate the old schoolhouse were inconsistent in a number of ways. Mr. Bailey testified that based on his research, he was unable to locate definitively either where the old schoolhouse or the schoolhouse lot was located in Keysville in 1890 and that the location which he chose for the center of town in preparing the boundary survey for the municipality of Keysville, was an approximation as to where he thought the schoolhouse would have been located inasmuch as he felt it was impossible to presently make any exact determination as to where the schoolhouse was located in Keysville in 1890. Mr. Bailey testified that his location for the center of town was just an

estimation as to the location of the Academy or schoolhouse lot in 1890. The Court finds specifically that in making his approximation as to where the center of town was located, Mr. Bailey was apparently not aware of and did not rely upon a deed subsequently produced by the Defendants, which deed is dated November 16th, 1892 and purports to convey unto the Burke County Board of Education a lot "known as the Academy lot" in the town of Keysville.

The Court finds that in beginning his preparations for the upcoming elections, Ralph Willis, the Elections Superintendent for Burke County, has accepted the map prepared by Mr. Bailey at its face value as correctly delineating the boundaries of the town of Keysville. Mr. Willis has used his boundaries as delineated on the map in making any determination relative to the eligibility of candidates and intends to use these boundaries in determining the eligibility of electors voting for candidates within the town of Keysville.

The Court finds that in addition to the title work done by Mr. Bailey in attempting to locate the schoolhouse for purposes of delineating the Keysville municipal boundaries, the Attorney General's office for the State of Georgia retained the services of John R. Murphy, a special Assistant Attorney General from Louisville, Georgia. Mr. Murphy was retained by the Attorney General's office for the purpose of attempting to locate from the public records of Burke County the location of the old schoolhouse that existed in 1890. Mr. Murphy in his search found no deed that described the school property as such. Mr. Murphy indicated that he did not think anyone could say for sure where the Academy property was located in 1890

and that it was impossible for him to determine definitively either where the old schoolhouse or schoolhouse lot was located. Mr. Murphy reached an opinion as to where the most likely location of the school property was, but that he could not, from his findings, direct a draftsman so as to enable him to draw a line with a circumference of one-half mile and accurately depict the municipal boundaries of Keysville as those boundaries were set out in the Act of Incorporation of the town.

The Court further finds that the State Law Department of the State of Georgia has also undertaken an investigation in order to seek to determine the exact municipal boundaries for the town of Keysville. The Court finds that in addition to employing a special Assistant Attorney General in order to do title research, an employee of the State Attorney General's office did independent research seeking to locate information which would enable the boundaries of the town to be set. The Court finds that based on the research that was done by the Attorney General's office, the exact site of both the schoolhouse and schoolhouse lot was incapable of determination. The Court further finds that the Attorney General's office has, in the past, advised the Governor of the State not to appoint councilmen and a mayor to fill the existing vacancies for the municipality of Keysville, in part because of the uncertainty of the location of the boundaries of the town. The Court finds that, at best, the Attorney General's office could delineate a general area with undefined limits within which the schoolhouse was probably located; however, at no time did the office of the Attorney General conclude where the actual municipal boundaries lie.

The Court finds that the deeds relied upon by Mr. Bailey and Mr. Murphy and the Attorney General's office in attempting to locate the old schoolhouse and in generalizing their location of the center of town for purposes of determination of the municipal boundaries are as follows:

1. A deed from L. A. Clark to Thomas B. Daniels dated April 7, 1890 and recorded in the Burke County Clerk's Office in Deed Book V, at pages 77-78. This deed conveys a three acre tract of land located generally within the area known as Keysville.

2. A deed from Thomas B. Daniels to Augusta Glass Works dated April 9, 1890 recorded in Deed Book V, at pages 77-78 of the Burke County Clerk's Office conveying a one acre parcel of the three acres received by Daniels from Clark.

3. A security deed from Augusta Glass Works to F. M. Whitney dated August 31, 1893 and recorded in the aforesaid Clerk's Office in Deed Book X, at pages 444-445. This security deed conveys to Whitney a security interest in two parcels of property owned by Augusta Glass Works. One of the two parcels of property conveyed is the one acre tract obtained from Thomas B. Daniels in the deed noted above.

4. A deed from Phil P. Johnston to the Trustees of the Methodist Church dated November 22, 1894, recorded in Deed Book 5, at page 483 of the aforesaid Clerk's Office. This deed conveys a lot of approximately seven-tenths of an acre.

All of the above-referenced deeds in some way reference the Keysville Academy property. The deed from

Clark to Daniels indicates that the three acre tract conveyed is bounded "on the North by lands of Mrs. M. F. Cook and lot of Keysville Academy". The deed from Daniels to Augusta Glass Works conveying the one acre parcel indicates that the one acre parcel is bounded "on the North by lands now or formerly belonging to Mrs. M. F. Cook and lot, the Keysville Academy". The security deed from Augusta Glass Works to Whitney contradicts the deeds from Clark to Daniels and Daniels to Augusta Glass Works in that it describes the one acre parcel owned by Augusta Glass Works which was purchased from Daniels as being bounded "East by lots of Thomas B. Daniels and Academy". It is, therefore, impossible to determine from these deeds whether the Academy lot was located North or East of the one acre tract owned by Augusta Glass Works.

The deed from Phil P. Johnston to the Trustees of the Methodist Church is dated November 22, 1894. Attached to the end of the deed and apparently recorded simultaneously with the deed is a plat or drawing of the seven-tenths acre lot being conveyed to the Methodist Church. As shown on this drawing or plat, the lot conveyed to the Methodist Church is bounded North by lands of Bradshaw, East by lands of Clarke, South by the Academy lot and West by lands of Daniels. The plat, however, is dated August, 1887, some seven years before the date of the deed. The narrative description contained within the body of the deed completely contradicts the plat or drawing attached at the end of the deed to the extent that it recites that the land conveyed is "located and bounded on all sides by other lands of said Phil P. Johnston". Both

Mr. Bailey and Mr. Murphy, in arriving at their generalized location for the center of town, relied heavily on the plat attached to the deed from Johnston to the Methodist Church.

Neither Mr. Bailey nor Mr. Murphy, when they undertook to locate the center of town, had the benefit of the 1892 deed from T. S. Clarke to the Burke County Board of Education. This deed was discovered in the Burke County Board of Education files and apparently had been delivered to the Board of Education, but never recorded. The deed is dated November 16, 1892 and recites that it conveys a four-fifths acre tract located in the town of Keysville "known as the Academy lot". The deed recites that the property conveyed is bounded on the North by a public street, South by lot of T.B. Daniel, East by a vacant lot and "West by Mrs. M. F. Cook and Augusta Glass Co.". This deed would tend to contradict the plat attached to the Methodist Church deed to the extent that the school deed indicates the Academy lot was bounded on the North by a public road and not the Methodist Church lot. The Methodist Church plat, however, appears to depict the Academy lot as being located immediately South of the Methodist Church lot and adjoining the Methodist Church lot. There is no reconciliation of this conflict. The school deed also contracts and conflicts with the descriptions contained in the deeds from Clark to Daniels and Daniels to Augusta Glass Works. The school deed, is however, consistent with the description contained in the security deed from Augusta Glass Works to Whitney in that this security deed indicates the one acre parcel being conveyed is bounded on its East by the Academy and the school deed indicates it

is bounded on its West by lands of Augusta Glass Company. Notwithstanding this agreement between these deeds, exact placement upon a plat or map of the lot conveyed to the Board of Education is impossible inasmuch as only a generalized location for the lot can be determined and further inasmuch as the deed to the Board of Education contains no lot dimensions, but rather only indicates that the lot size is four-fifths of an acre.

A 1906 plat of the town of Keysville also appears consistent with the Whitney security deed and the school deed in that it depicts the one acre Augusta Glass Works property as having on its Northern boundary a lot owned by Mrs. M. F. Cook. Accordingly, to the extent that the school deed is correct and the school property was bounded on the West by lands of Cook and Augusta Glass Works, the center of town would have to be moved some 200 to 250 feet Southwest of the location presently used by Mr. Bailey to depict the town boundaries. The Court finds, however, that notwithstanding the generalized location of the school lot that could be made from these deeds, there is no evidence of the exact location or dimensions of the lot or of the exact location of the schoolhouse itself upon which the municipal boundaries were based.

In addition to the above evidence, the Court finds that the Defendants have submitted various affidavits which were considered as evidence by the Court. One of the affidavits was given by one of the oldest living citizens of the Keysville area. This affidavit given by Mr. Henry Key indicates that he was born on August 8, 1895. Mr. Key's affidavit further indicates that "at the time of the incorporation of Keysville in 1890, a school for white

students on which the city limits of Keysville is based and which was known as the Keysville Academy stood just Northeast of the present location of the Keysville Methodist Church next to a grove of large oak trees". The location which Mr. Key gives for the schoolhouse is some 300 feet Northeast of the location which is being used for purposes of the upcoming election. The location which Mr. Key gives for the schoolhouse is some 600 feet Northeast of the location for the Academy lot that is suggested by the Augusta Glass Company to Whitney security deed and the Clark to Burke County Board of Education school deed. Although Mr. Key's affidavit indicates that he never personally saw the schoolhouse inasmuch as it was destroyed at approximately the time of his birth, the affidavit indicates that his information is based upon "conversations and discussions that I have had with my parents who were lifelong residents of Keysville and other residents of the Keysville area during my lifetime".

In addition to that affidavit, an affidavit of Mr. Roy Chalker, Publisher of the True Citizen, the official gazette for Burke County, Georgia, was offered. Mr. Chalker's affidavit had attached page 3 of an issue of the True Citizen dated March 7, 1891, less than three months after the incorporation of the town. That article indicated that there were problems in locating the boundaries of Keysville even at that point in time. The article notes that at the time the town was incorporated, "(U)nfortunately, the limits were not sufficiently circumscribed". It is, therefore, apparent to this Court that the problem with locating the municipal boundaries is not a new problem. All of evidence produced by the Defendants at the hearing does nothing to clear up the substantial conflicts which exist as

to the location of either the schoolhouse or the lot upon which the schoolhouse sat. In fact, the Key affidavit and the Smith affidavit which had attached the deed from Clark to the Burke County Board of Education both contradict the location which has been selected by the County for use as the center of town.

The Court finds that based on all of the testimony given and all of the evidence received by the Court, it is impossible even to delineate the boundaries of a lot or any number of lots on which the school might have been located. The best that can be done is to generalize areas where the lot might have been located.

The Court finds that as to the exact boundary line of the town, there is nothing less than absolute confusion. The Court finds that not only is there substantially conflicting evidence as to the location of the lot upon which the schoolhouse sat in 1890, but also that there is absolutely no evidence in the record as to where the schoolhouse itself was located. The Court finds that the present map purporting to delineate the municipal boundaries of Keysville was prepared based on an approximation of the location of the lot upon which the schoolhouse was located. The Court finds that there is no evidence of the exact location or dimensions of any of the lots upon which the school may have been located and that no determination of the location of the schoolhouse itself has been made. The Court further finds that at best a generalized location of the school lot could be made, which location would be approximately 600 feet long and 200-300 feet wide. Based upon the evidence, any more accurate or narrow delineation of the lot appears impossible.

The Court finds from the evidence that any move in the generalized location of the center of town would substantially affect the number of persons who could vote in any election for the municipal offices for the town of Keysville and would also affect the eligibility of three of the announced candidates for office.

The Court finds that the boundaries of the town of Keysville which were submitted to the United States Attorney General's office for preclearance pursuant to the provisions of Section 5 of the Voting Rights Act were improperly determined and are not supported by the evidence. The Court, accordingly, finds that those boundaries do not accurately depict the municipal boundaries of the town of Keysville in accordance with its Act of Incorporation.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes that it is proper for Ralph B. Willis, the Superintendent of the Burke County Board of Elections, to be made a party to this action and it is hereby ordered that the said Ralph B. Willis be made a party to this action and be served with copies of all pleadings previously filed in this case, together with a copy of this Order.

IT IS FURTHER ORDERED that the municipal elections scheduled for the town of Keysville for January 4th, 1988 be and they are hereby enjoined; it being the determination of this Court that a determination as to the eligibility of candidates for the municipal offices and a determination as to the eligibility of voters for the municipal elections is impossible because of the inability to

properly delineate the municipal boundaries in accordance with the Act of Incorporation for the town. The Court finds that there is no sufficient evidence to carry any burden with regard to a proper location for the center of town.

It is this Court's conclusion that the entry of this Order does not enact or seek to administer any standard or procedure with respect to voting different from that in force or effect on November 1, 1964. The Order of this Court does not in any way change the municipal boundaries as submitted to the Attorney General's office for preclearance pursuant to Section 5 of the Voting Rights Act, but rather determines that the location of those boundaries is not supported by the evidence. Accordingly, this Court concludes that this Order is not subject to Section 5 preclearance.

IT IS FURTHER ORDERED that the Defendants are restrained and enjoined from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law.

It appearing to the Court that the Defendants have acted in good faith, no finding of contempt will be made against any of the Defendants.

SO ORDERED, this 31st day of December, 1987.

/s/ Albert M. Pickett
JUDGE, SUPERIOR
COURT, AUGUSTA
JUDICIAL CIRCUIT

Presented by:
N. Kenneth Daniel
Attorney for Plaintiffs
505 Courthouse Lane
Augusta, Georgia 30901

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA GRESHAM, ET AL.	)	
Plaintiffs	)	CIVIL ACTION NO. 1:87-CV-867-JOF
v.	)	
JOE FRANK HARRIS, ET AL.	)	(Filed Feb. 1, 1990)
Defendants	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JAMES E. POOLE, JR., WILLIAM C. HARMON, J. W. MARSHALL, FRED MUNS, LOUIE B. WAY and JULIAN H. KIGHT, Defendant-Intervenors in this action, do hereby appeal to the Supreme Court of the United States from the Final Order of the Three Judge District Court filed in this action on January 3, 1990 and entered on the Docket on January 9, 1990, which Order resinstated [sic] a previous Order of the Three Judge District Court granting the Plaintiff's Motion for a Permanent Injunction.

This appeal is taken pursuant to 28 U.S.C., Sec. 1253.

This 31st day of January, 1990

Allgood & Daniel
456 Telfair Street
Augusta, Georgia 30901

/s/ N. Kenneth Daniel
N. KENNETH DANIEL
Attorney for Defendant-Intervenors
Georgia State Bar No. 204250

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within and foregoing Notice of Appeal by depositing the same in the United States mail, postage prepaid, addressed to all counsel of record as follows:

Laughlin McDonald
American Civil Liberties Union
Foundation
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303

Preston B. Lewis, Jr.
P. O. Box 88
Waynesboro, Georgia 30830

George P. Shingler
State Attorney General's Office
40 Capitol Square, S.W.
132 State Judicial Building
Atlanta, Georgia 30334

Solicitor General, Department
of Justice
Washington, D.C. 20530

This service is made in accordance with and pursuant to Supreme Court Rule 28.3, and 28.4(a).

This 31st day of January, 1990.

/s/ N. Kenneth Daniel
N. KENNETH DANIEL

EXHIBIT 6

21-3-125. Qualification of voters; reregistration of voters purged from list of electors; determination by governing authority of method by which registration lists are to be maintained; manner of registration of electors in municipalities maintaining own registration lists.

(a) No person shall vote in any primary or election unless he shall be:

(1) Registered as an elector in the manner prescribed by law;

(2) A citizen of this state and of the United States;

(3) At least 18 years of age;

(4) A resident of the municipality in which he seeks to vote, notwithstanding any provision of any municipal charter to the contrary; and

(5) Possessed of all other qualifications prescribed by law.

(a.1) (1) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.

(2) No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

(b) Any person who possesses the qualifications of an elector except those concerning age shall be permitted to register to vote if such person will acquire such qualifications within six months after the day of registration;

provided, however, that such person shall not be permitted to vote in a primary or election until the acquisition of such qualifications.

(c) Notwithstanding any other provision of this article, any person who was qualified and registered to vote on September 1, 1968, shall not be required to reregister under the terms of this article unless such person shall have become or becomes disqualified to vote by reason of having been purged from the list of electors or for any other reason whatsoever, in which event such person shall, in order to become registered to vote, reregister under the terms of this article.

(d) The governing authority of any municipality may by charter, ordinance, or resolution elect either to maintain its own registration or to provide for the city to use the county registration list, stating that any person who is a resident of the municipality and who is registered as an elector with the board of registrars of the county shall be eligible to vote in a municipal primary or election. If the municipality elects to maintain its own registration list, the municipality shall use the form of the registration card and the questions to be propounded to an applicant as prescribed in Code Section 21-2-217. The qualifications of a person seeking to vote in a municipal primary or election shall be determined by this chapter and the Constitution of Georgia. Provided, however, municipalities which are the county seats of counties having populations of not less than 32,500 and not more than 34,100 according to the United States decennial census of 1970 or any future such census shall not be authorized to maintain their own registration lists but shall use the registration list of the county and such county shall be

required to furnish such list to the municipality. Provided, further, that any such counties shall be required to furnish a list of the registered voters residing within such municipalities to the governing authorities of the municipalities no later than seven days before any election or primary covered by this chapter is to be held in such municipalities.

(e) In a municipality maintaining its own registration list, any person desiring to register as an elector shall apply to a registrar or a deputy registrar and shall furnish such officer with proper identification and information which will enable him to fill in all blanks appearing on the registration card. When any person who seeks to register as an elector is asked to provide proper identification by a registrar or a deputy registrar, as required by law, it shall be sufficient for the applicant to exhibit his valid driver's license, birth certificate, credit card, food stamp card, social security card, check-cashing card, passport, school record, work identification record, utility bill, school identification, certified copy of marriage license, or Medicaid, medicare, or welfare identification. On completion of the form, the officer shall administer the oath to the applicant and then have him sign it, and the officer shall attest it. Upon request of the applicant, the officer taking the application shall read or repeat the oath distinctly to the applicant; and, if the applicant cannot sign his name, the officer shall sign it for him, the applicant making his mark thereto. (Ga. L. 1958, p. 269, § 2; Code 1933, § 34A-501, enacted by Ga. L. 1968, p. 885, § 1; Ga. L. 1971, p. 634, § 1; Ga. L. 1972, p. 836, § 1; Ga. L. 1973, p. 277, § 1; Ga. L. 1974, p. 82, § 1; Ga. L. 1974, p. 99, § 1; Ga. L. 1981, p. 545, § 1; Ga. L. 1981, p. 551, § 1; Ga. L.

1981, p. 1728, § 2; Ga. L. 1982, p. 2107, § 25; Ga. L. 1983, p. 140, § 1; Ga. L. 1983, p. 786, § 3; Ga. L. 1984, p. 1, § 16; Ga. L. 1988, p. 639, § 2.)

The 1988 amendment, effective July 1, 1988, inserted "certified copy of marriage license," in the second sentence of subsection (e).

Exhibit 7

IN THE SUPERIOR COURT OF BURKE COUNTY
STATE OF GEORGIA

IN RE: CONTEST OF ELECTION RESULTS OF THE KEYSVILLE MUNICIPAL ELECTIONS HELD JANUARY 4, 1988.	))))	CIVIL ACTION NO. 88-V-21

ORDER

This case is presently before the Court on an election contest from the election conducted in Keysville, Burke County, Georgia, on January 4, 1988. The primary issue of the contest, as well as of all proceedings leading up to the subject election and contest, involves a question of the location of the municipal boundaries of the city of Keysville.

FINDINGS OF FACT

1. Factual History of the Dispute

The city of Keysville, Georgia was incorporated in 1890 pursuant to Georgia Law 1891-91, Vol. II, p. 657, No. 246, Sec. II. This act directed that the boundaries of the city would extend one-half mile in every direction from the schoolhouse which was then located in the town of Keysville. This schoolhouse, known as the "Academy", was destroyed in approximately 1895. The boundaries have not been changed or redesignated since that date, although problems with the location of the boundaries apparently existed as early as 1891, shortly after the incorporation. This fact is evidenced by an article in the

March 7, 1891 edition of the *True Citizen*, the legal organ of Burke County, entitled "Trouble at Keysville," which indicated that the town limits as noted in the act of incorporation "were not sufficiently circumscribed."

The incorporating act also provided that the municipal government, consisting of one mayor and five councilmembers, would be elected "on the first Monday in January, 1891, and on the same day annually thereafter an election shall be held in said town for mayor and councilmen, whose term of office shall be for one year. . . .No one shall vote for or be eligible to said offices of mayor and councilmen who is not a *bona fide* citizen of said town. . . ." (Emphasis in text) The last election was held in approximately 1933. No definite reason is offered or known as to why no elections have been held in the city since that date. The offices of the municipal government have, therefore, been vacant since approximately 1933.

There are approximately 165 registered voters in Keysville, a majority of whom are black. For several years, a number of black residents, some of whom are parties to this litigation, tried to reactivate the municipal government.

Beginning in or about 1985, two committees were formed and met concerning the reactivation of the Keysville municipal government. The committees were called the "Steering Committee for the Reactivation of Town Government" and the "Committee to Reactivate the Municipal Government for the Town of Keysville." The members of the two committees were residents of the locality in the around the township of Keysville. The

committees sought to reestablish the municipal government for the purpose of securing municipal services such as water, sewage, and other services, as well as fire and police protection, which were not previously available.

The Georgia Municipal Code Sec. 21-3-408(b) provides that in the event of vacancy in municipal offices, and if the municipal charter fails to provide a method for filling the vacancy, "the governing authority shall thereupon call a special election to fill such a vacancy." Also, O.C.G.A. Sec. 21-3-8(3) provides that all municipal elections shall be conducted by the "superintendent, registrars, deputy registrars, poll officials, and other employees" selected by the governing authority. Neither of these routes were available to the citizen groups, however, as there was no existing governing authority.

At the request of the citizens' groups, the Burke County Attorney, Mr. Preston Lewis, Jr., on behalf of the Keysville residents, contacted the Georgia Attorney General's office for advice as to how they might reactivate the municipal government. The Assistant Attorney General, Mr. Hugh Jeffrey Lanier, responded by letter, dated August 2, 1985, and advised the citizen committees that the following methods of action were available to them:

(a) Request the Governor to appoint persons to fill the existing vacancies;

(b) File an action in the Superior Court to declare the offices vacant so that the Governor could appoint persons to fill the existing vacancies;

(c) Conduct a "town meeting" to elect temporary officers for the purpose of holding an election; and

(d) Request the General Assembly to provide by local act temporary officers and a method of election for permanent officers.

The Georgia Constitution, Article V, Sec. II, Para. VIII provides that "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law." In this case, however, the Governor has, on the advice of Mr. Lanier and the Governor's Executive Counsel, refused to make such appointments due to the uncertainty of the municipal boundaries. There is no evidence in the record that an action was ever filed in the Superior Court to declare the officers vacant.

On September 9, 1985, a town meeting was had in accordance with Mr. Lanier's instructions. Turetha Neeley and Upton Cochran were elected to explore the legal requirements for reestablishment of the active government, and were later elected co-superintendents of elections and given the oath of office by the Probate Judge of Burke County. A special election was set for January 6, 1986, and they began publishing notices concerning the election in the *True Citizen*.

The following persons qualified and ran for office:

Emma Gresham – Mayor
Clayton Neely, Jr. – Councilmember
Sharon Anfield – Councilmember
Donald Wright – Councilmember
Melvin Streetman – Councilmember
Earl M. Neely – Councilmember

None of the above-name individuals were opposed in the election, therefore, on December 30, 1985, after the

qualifying period had closed, these persons were declared elected and the oath was administered to them by the Probate Judge of Burke County.

It was at or about this point that the litigation concerning these matters began. But before discussing the procedural history of this case, it is appropriate to examine the difficulties which have arisen in determining the municipal boundaries of the city of Keysville.

A number of persons have attempted to define the municipal boundaries through various means. In early 1985, it is alleged that Herman Lodge and unknown others were seen posting signs immediately outside the current residential areas of the township of Keysville which purported to represent the town limits.

The most extensive research was conducted by Mr. James Bailey, the Chief Appraiser and Tax Assessor for Burke County. Mr. Bailey began his independent research after having been asked by the County Commissioners to assist some lawyers in determining the city boundaries. Mr. Bailey prepared a map, from which the voters list would later be prepared for the January 4, 1988 election, based upon the following documents:

1. Deed from L. A. Clarke to Thomas B. Daniel, dated April 7, 1890 and recorded in Deed Book V, pp. 77-8.

2. Deed from Thomas B. Daniel to Augusta Glass Works, dated April 9, 1890 and recorded in Deed Book V, pp. 77-8.

3. Deed form Augusta Glass Works to S. M. Whitney, dated August 31, 1893 and recorded in Deed Book X, pp. 444-45.

4. Deed from Phil P. Johnston to the Trustees of the Methodist Church, dated November 22, 1894 and recorded in Deed Book 5, p. 483.

5. Plat of the town of Keysville prepared by Matthew S. Lively, dated September, 1906, File No. A-3427.

It is important to note that Mr. Bailey's search was for the location of the Academy lot, not the school itself. The incorporating act set the measure of the city boundaries from the location of the schoolhouse. Mr. Bailey's estimates were taken from the center of what he purported to be the location of the Academy Lot. Even then, Mr. Bailey has admitted, he has not been able to, nor could he, determine the exact location of the schoolhouse.

In June of 1987, Mr. John Murphy, a Special Assistant Attorney General was employed by Mr. Lanier to examine the title records at the Burke County Clerk's Office. The Georgia Attorney General's office staff also met with Keysville citizens in this regard and interviewed a longtime citizen, Mr. Henry Key. Still, they were unable to ascertain the precise location of the schoolhouse, but did reach a determination as to a generalized location. This generalized location was at a point some 200 feet west and 200 feet south of the location designated by Mr. Bailey.

Mr. Henry Key, a longtime resident of Keysville, having been born there on January 8, 1895, has in his affidavit stated that based upon conversations with his parents and other residents, the Keysville Academy, then a school for whites, stood just northeast of the present location of the Keysville Methodist Church, next to a grove of large oak trees. This would place the Academy's

location some 250 feet northeast of the location designated by Mr. Bailey.

A memorandum was located by Ms. Opal A. Davis, the former secretary of the Keysville United Methodist Church, a memorandum which she states she prepared, indicating that a tornado struck Keysville in the late 1890's during which all of part of the Church roof was blown off, that it was in the daytime, because the nearby school was severely damaged and members' children were involved. This memorandum supports the earlier assertions of Mr. Key.

Finally, Mr. James Smith, the Burke County School Superintendent, located a deed in the Burke County Board of Education files which apparently had never been recorded at the Burke County Courthouse. This deed purports to convey the Academy Lot. The deed gives a generalized description of the property which is consistent with at least one of the deeds relied on by Mr. Bailey, but is inconsistent with others. This deed would appear to move the location of the Academy southwest of the location designated by Mr. Bailey.

In early 1987, Mr. Lanier prepared and presented House Bill 184 amending Chapter 30, Title 36 of the Official Code of Georgia Annotated, adding a new code section 36-30-13 which read " . . . in the event that all seats on the governing authority of a municipality are vacant, the elections superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for

the municipality for the purpose of conducting, the special election. The Board of Registrars for the county shall prepare the electors list for the special election."

In August of 1987, Mr. Lanier, in a opinion to the State Elections Director, stated that it is the *duty* of the County Elections Superintendent to call such a special election to fill vacancies and he shall be required to do so. This opinion was communicated to Ralph B. Willis, Burke County Board of Elections Superintendent. Mr. Lanier further advised that "based upon the investigation conducted by our office in reviewing deed records and maps, and interviewing elderly citizens . . . the boundaries appear capable of being sufficiently fixed as to determine the electors of the Town of Keysville . . . [and that] the Board of Registrars of Burke County is required to prepare an electors list for the special election."

Mr. Willis then contacted the Burke County Attorney, Mr. Lewis, who arranged for him to receive a map from the County Property Tax Office which purported to delineate the city boundaries. This was the map prepared by Mr. James Bailey, mentioned earlier. This map was used to compile a list of electors. Mr. Willis, pursuant to the instructions of Mr. Lanier and O.C.G.A. Sec. 36-30-13, called a special election for January 4, 1988. The voters list, map, and call for the election were then submitted to the United States Attorney General's office for preclearance under Section 5 of the Federal 1965 Voting Rights Act (infra) and the same were precleared on December 9, 1987.

On January 4, 1988, the elections were conducted. And it is from these elections that the case before this Court arose.

2. Procedural History of the Dispute

A. Burke County Superior Court, *Poole, et al. v. Lodge, et al.*, Civil Action No. 85-V-414. This action was filed on December 31, 1985. At that time the Defendants were seeking to schedule and conduct municipal elections. The Plaintiff's sought to enjoin these elections on the grounds that:

(1) the municipal boundaries were inexact; and

(2) the scheduling had not been done in compliance with the Georgia Municipal Election Code.

Prior to the filing of this action, on December 31, 1985, the Plaintiff's sought and obtained a Temporary Restraining Order. The Court, in granting the temporary restraining order, made the following findings of fact: (a) No proper election superintendent had been elected according to law; (b) There existed no defined municipal boundaries from which a list of certified electors could be drawn, candidates qualified, or electors qualified; (c) The requirements of the Georgia Municipal Election Code had not been met or followed concerning scheduling of elections or concerning the qualifications of candidates; (d) There had been no proper scheduling of the municipal election; and (e) There had been no property [sic] qualification of candidates. Therefore, the Court restrained and enjoined the defendants from taking any actions regarding the scheduling or conducting of municipal

elections until all requirements of the Georgia Municipal Elections Code had been met. Further, he gave the defendants until 2:30 p.m. on January 6, 1986 to show that proper procedures had been taken or he would issue a preliminary injunction.

On January 17, 1986, the Court issued a Preliminary Injunction repeating the findings and restraints of the Temporary Restraining Order.

On December 3, 1987, the Plaintiff's entered a Motion for Contempt, Motion to Add a Party Defendant, and Motion to Expand the Preliminary Injunction. In this motion, the Plaintiff's admit that the new O.C.G.A. Sec. 36-30-13 (cited previously) cleared up the questions of the scheduling of the elections, however, claimed that the boundary issue still remained to bar the holding of the elections. Further, the Plaintiff's informed the Court that Mr. Willis, of the Burke County Board of Registrars, was planning to conduct elections on January 4, 1988. They therefore sought to add Mr. Willis as a party defendant to that action. A hearing was held on this Motion on December 30, 1987.

On December 31, 1987, the Court issued an order adding Ralph B. Willis, as Superintendent of Burke County Board of Elections, as a party defendant. The Court further enjoined the elections scheduled for January 4, 1988 holding that the defendants were enjoined and restrained from undertaking any actions regarding the scheduling or conducting of municipal elections until the municipal boundaries had been properly delineated in accordance with the law. The Court also found that the

requirements for preclearance and approval under Section 5 of the 1965 Federal Voting Rights Act were not applicable to its order because the Court's order did not "enact or seek to administer any standard or procedure with respect to voting different from that in force or effect on October 1, 1964." Further, the Court held that its order did not change the boundaries as submitted to the United States Attorney General for preclearance according to Section 5, "but rather determines that the location of those boundaries is not supported by the evidence."

B. United States District Court, Northern District of Georgia, *Gresham, et al. v. Harris, et al.*, No. C87-867A. This action was filed on April 29, 1987 seeking declaratory and injunctive relief against state officials and agencies for failure to appoint persons to fill vacancies or conduct elections for the municipal government of Keysville, and for failure to enforce the provisions of the 1st, 13th, 14th, & 15th Amendments of the U.S. Constitution and Sections 2 & 5 of the Voting Rights Act of 1965, 42 U.S.C. Secs. 1973 and 1973c. Plaintiff's complaint alleges that "Defendant's refusal to fill the existing vacancies . . . is a standard, practice, or procedure with respect to voting different from that previously in force or effect within the meaning of Section 5, that may not be implemented without prior approval of the Attorney General or the United States District Court of the District of Columbia.

On December 30, 1987, the Plaintiffs submitted a Motion for Temporary Restraining Order and a Preliminary Injunction restraining and enjoining implementation of the Burke County order issued orally that same date absent compliance with the preclearance provisions of

Section 5 of the Voting Rights Act. The motion was granted.

On December 31, 1987, Plaintiffs in the Burke County action sought to intervene, and their application was granted.

After a hearing on January 14, 1988, before a three judge panel, the preliminary injunction was granted. The panel ruled that a state court may not stop an election, or change an election date, without preclearance under Section 5 of the 1965 Voting Rights Act. No written order or opinion has yet been issued in that case.

C. Challenge of Election to Burke County Board of Registrars 1/4/88.

The elections took place on January 4, 1988. On that same day, Joseph Cochran, Sr. and his wife challenged 41 voters, 21 of whom actually voted in the election on the grounds that the boundaries of the city had not been determined and that the residency of the voters could not be established. Their challenges were heard by the Board of Registrars after the polls closed and were denied. No appeal was made of this decision.

The election was held as scheduled. The results of the election were as follows, broken down by candidate, race of candidate, and number of votes received:

MAYOR	Gresham	(Bl) – 75	Cochran	(Wh) – 65
Council				
Post 1	Poole	(Wh) – 67	Rucker	(Bl) – 65
Post 2	Lewis	(Bl) – 78	Padgett	(Wh) – 64
Post 3	Holland	(Bl) – 79	Munns	(Wh) – 64
Post 4	Morris	(Bl) – 78	Terrell	(Bl) – 64
Post 5	Neely	(Bl) – 74	Russell	(Wh) – 68

Each race was decided by a margin of less than the number of challenged voters who actually voted. Two of the candidates elected, Mary Holland and Nollie Mae Morris, reside within the boundaries as delineated by Mr. Bailey on the map used, but would reside outside the boundaries if based on the location indicated by the unrecorded schoolhouse deed.

D. Burke County Superior Court, *In re: Contest of Election Results of the Keysville Municipal Elections held Jan. 4, 1988,* Civil Action No. 88-V-21. This action was filed on January 25, 1988. It was originally submitted as a Petition to Emma Gresham, Mayor elect, Ralph B. Willis, Burke County Elections Superintendent, the Burke County Board of Registrars and the Burke County Superior Court. The governing authority, however, at a meeting of the town council conducted on January 13, 1988 found that O.C.G.A. Sec. 21-3-420 required that all members of the governing authority disqualify themselves from judging the contest. This decision was appealed to the Superior Court of Burke County, and came before this Court as a result of an Executive Order issued by the Governor of the State of Georgia, the Honorable Joe Frank Harris, dated February 29, 1988.

This action is premised on the following grounds:

(1) That illegal votes have been received sufficient to change or place in doubt the results of the election;

(2) That certain candidates elected are ineligible for office because they are not residents of the municipality; and

(3) That the municipal boundaries "are indeterminable to such an extent that it is impossible to determine conclusively which electors are entitled to vote at the municipal elections and which persons are entitled to offer as candidates for the municipal elections."

CONCLUSIONS OF LAW

The nomination, election, or eligibility of any person seeking nomination, having been nominated, or elected may be contested by any person who was a candidate at such primary or election or by any aggrieved elector who was entitled to vote for such person. O.C.G.A. Sec. 21-2-521. The grounds for such contest may be as follows:

(1) Misconduct, fraud, or irregularity by any primary or election official(s) sufficient to change or place in doubt the result;

(2) When the defendant is ineligible for the nomination or office in dispute;

(3) When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;

(4) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or

(5) For any other cause which shows that another was the person legally nominated, elected or eligible to compete in a run-off primary or election. O.C.G.A. Sec. 21-2-522.

The United States Congress adopted, and this State and its political subdivisions are subject to, the Federal Voting Rights Act of 1965, 42 U.S.C. Sec. 1973(c) which states that whenever a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that such does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or may submit same to the Attorney General of the United States for approval.

DISPOSITION

This Court finds that all questions presented to it in the course of this election contest have been previously litigated, as noted in the foregoing findings of fact, and continue to be litigated both in Burke County Superior Court, Civil Action No. 85-V-414, and U.S. District Court, Case No. C87-867A. This dispute does not concern matters regularly the subject of an election dispute, but rather surrounds the issue of the municipal boundary.

This Court further finds that the municipal boundaries of the City of Keysville remain undetermined and uncertain. Based upon the evidence and proceedings to date, it is evident that the boundaries as conceived by the drafters of the 1890 Act of Incorporation will never be determined to any degree of accuracy or certainty. What the people of the township of Keysville require is bold

legislative action of the part of their representatives to redefine and establish the municipal boundaries in such a manner as will satisfy all parties to this litigation. Such action is, however, purely legislative and not within the reach of this Court's power and authority.

Therefore, it is the finding and judgment of this Court that based upon the map and voter's list as submitted by the Burke County Board of Registrars and precleared and approved by the United States Attorney General, the results of the election of January 4, 1988 are confirmed. This finding and order, however, shall not become effective for a period of not more than thirty (30) days from the date of this order, during which time this Court requests and directs the Office of the Attorney General of the State of Georgia take such actions as necessary to seek preclearance and approval under Section 5 of the 1965 Voting Rights Act of the December 31, 1987 order issued by the Superior Court of Burke County in the case of *Poole v. Lodge*, Civil Action No. 85-V-414.

This Court does take notice of and has receive the Motion to Dismiss the Election Contest Petition filed by respondent, Mayor Emma Gresham. This motion is moot because of the Court's present ruling.

IT IS SO ORDERED:

This 23 day of May, 1988.

/s/ William F. Grant
WILLIAM F. GRANT,
Chief Judge
Superior Court,
Northern Judicial
Circuit

Supreme Court, U.S.
FILED
MAY 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1564

In The

Supreme Court of the United States

October Term, 1989

JAMES E. POOLE, JR., ET AL.,

Appellants,

v.

EMMA GRESHAM, ET AL.,

Appellees.

On Appeal From
A Three-Judge Panel Of The
United States District Court
Northern District Of Georgia

MOTION TO DISMISS OR AFFIRM

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No. 89-1564

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JAMES E. POOLE, JR., ET AL.,

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Northern District Of Georgia

MOTION TO DISMISS OR AFFIRM

The State Defendants-Appellees, Joe Frank Harris, Michael J. Bowers, Russell N. Sewell, Max Cleland, and State Election Board, and the local Defendants-Appellees, Burke County Board of Registrars, Weston Fortson, W. E. Bessent, John M. Moseley, Burke County Board of Elections, Ralph B. Willis, Michael M. Searles, and Morris Green, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge panel of the United States District Court for the Northern District of Georgia on the ground that it is manifest that

the question presented by this appeal is so unsubstantial as to not need further argument.

I.
STATEMENT OF THE CASE

The Town of Keysville, located in Burke County, Georgia, was incorporated in 1890 with corporate limits extending one-half mile in every direction from the schoolhouse located there. Ga. Laws 1890-91, Vol. II, p. 657. The schoolhouse upon which the boundaries were established was destroyed in approximately 1895, and apparently no one knows where it was located.

The charter for the Town of Keysville requires that a mayor and five council members be elected for one-year terms on the first Monday in January of each year. At some point during the 1930's, the Town of Keysville ceased to elect persons to fill these municipal offices. The government of the Town of Keysville remained inactive for many years despite the fact that Keysville continues to be a current municipality in the State of Georgia.

By 1985, numerous black residents of the Town of Keysville had begun efforts to reactivate the municipality. Because the laws of the State of Georgia did not contemplate a situation such as the one existing in the Town of Keysville, in which the town simply ceased performing governmental functions, the residents of the Town of Keysville experienced difficulty in reactivating the municipal government. In 1987, the Georgia General Assembly enacted a law, Ga. Laws 1987, p. 178, codified as O.C.G.A. § 36-30-13, which provided that, in the event

that all seats on the governing authority of a municipality are vacant, the election superintendent of the county shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint someone to conduct, the election to fill the vacancies, and that the board of registrars of the county must prepare the electors list for the election. In interpreting this law, the Attorney General of Georgia instructed the Georgia Secretary of State that the duty to call for the election to fill the vacancies was mandatory on the county election superintendent.

Based upon this law and this advice, the Election Superintendent of Burke County called for an election to be held on January 4, 1988, to fill the vacancies existing on the governing authority of the Town of Keysville. The Board of Registrars of Burke County prepared an electors list for use in the election. The call and a map depicting the municipal boundaries, as determined by the Burke County Tax Assessor, were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) for preclearance. The Attorney General reviewed the submission and precleared the election to be conducted in conformity with the submitted material, including the map depicting the municipal boundaries of the Town of Keysville, on December 9, 1987.

On December 3, 1987, certain citizens of the Town of Keysville, who are the Appellants herein, sought an injunction from the Superior Court of Burke County to enjoin the county election board and board of registrars from conducting the January 4, 1988, election. By order

entered on December 31, 1987, the superior court enjoined the county defendants "from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the Town of Keysville have been properly delineated in accordance with the requirements of law." (Exhibit 4 of Appendix to Jurisdictional Statement).

On December 31, 1987, the Plaintiffs-Appellees, in response to the order of the Superior Court of Burke County, sought a temporary restraining order from the United States District Court for the Northern District of Georgia to enjoin the enforcement of the superior court's order until that order was precleared in accordance with Section 5. The District Court granted the request for a temporary restraining order and permitted the election to be conducted on January 4, 1988.

A hearing was subsequently conducted before a three-judge panel of the District Court on the same issue and a preliminary injunction was issued continuing to enjoin the implementation of the superior court order until and unless the order was precleared. Upon agreement of the parties, the three-judge panel considered the issue of a permanent injunction based upon the record presented at the hearing on the preliminary injunction, and on June 30, 1988, the three-judge panel issued its opinion (Appendix, Exhibit 3) making the preliminary injunction permanent.

Upon appeal of the District Court's permanent injunction, this Court remanded the cause to the District Court to consider the question of mootness. After briefing and a further hearing on this issue, the District Court

concluded that the superior court's order could still be in effect, and, consequently, this cause was not moot. (Appendix, Exhibit 1). From this decision of the District Court, reinstating its June 30, 1988 order, the Appellants again bring an appeal to this Court. (Appendix, Exhibit 5).

II.

ARGUMENT

The question presented by the Appellants in this case is whether a state court order which, in enforcing previously precleared state election law, enjoins or delays a pending election until such time as state election law is complied with, is subject to preclearance under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) before such order may be enforced. However, this is not the issue the District Court decided.

> The only question before this court is whether the superior court order effects a change in voting requirements that must be precleared under section 5 before being enforced. (Appendix, Exhibit 3, at A-12).

The District Court held that the order of the Superior Court of Burke County, if given effect, would result in a change of a previously precleared practice and procedure in two ways. First, the superior court's order would result in a change of the date of the election; second, the superior court's order would set aside the municipal boundaries of the Town of Keysville. Both the date of the election and the municipal boundaries had been precleared by the Attorney General of the United States under Section 5. (Appendix, Exhibit 3, at A-12 to A-15).

On remand, the District Court concluded that the continuing possibility that the superior court's order could cause a change in the municipal boundaries keeps this controversy alive. (Appendix, Exhibit 1).

The provisions of Section 5 prevent the State of Georgia and its political subdivisions from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," until and unless such qualification, prerequisite, standard, practice, or procedure has first been precleared either by a declaratory judgment of the District Court for the District of Columbia or by submitting the proposed change to the Attorney General of the United States. 42 U.S.C. § 1973c.

Section 5 has been interpreted broadly to apply to all changes in laws, practices, and procedures different from those in effect on November 1, 1964, regardless of how minor the change is. In *Allen v. State Board of Elections*, 393 U.S. 544, 563-69 (1969), this Court held that the phrase "standard, practice, or procedure" must be given the broadest possible scope. Subsequent cases have continued to underscore the broad scope of Section 5. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971) (Change in location of polling places, change in municipal boundaries, and change from ward to at-large elections); *Georgia v. United States*, 411 U.S. 526 (1973) (Reapportionment changes); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978) (Change in form of municipal government); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978) (County school board regulation).

The reach of Section 5 has also been given broad interpretation. This Court has not limited the application of Section 5 merely to states and their political subdivisions. This Court has held that Section 5 applies to all entities having power over any aspect of the electoral process within a jurisdiction subject to the preclearance requirements of Section 5. *See, e.g., United States v. Board of Commissioners of Sheffield, Alabama, supra; Dougherty Board of Education v. White, supra.* In 1982, this Court included orders of a state court within the reach of Section 5. *Hathorn v. Lovorn*, 457 U.S. 255, 265 (n.16) (1982) (" . . . a state court decree directing compliance with a state election statute contemplates 'administ[ration]' of the state statute within the meaning of Section 5.")

Clearly, Section 5 applies to this case. This Court in *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985), found that the rescheduling of the date of an election, even if not permanent, is a change under Section 5. "The Voting Rights Act reaches changes that affect even a single election." This Court has also held that a change in municipal boundaries, because it affects who may register to vote, is a change under Section 5. *Perkins v. Matthews*, 400 U.S. 379, 388-94 (1971).

CONCLUSION

This case presents no novel arguments concerning either the application or the reach of Section 5. The existing precedents of this Court answer every argument presented by the Appellants. Consequently, there are no substantial arguments for review by this Court and the

decision of the three-judge panel should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1564

IN THE

Supreme Court of the United States

October Term, 1989

JAMES E. POOLE, JR., et. al.,

Appellants,

v.

EMMA GRESHAM, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether voting changes directed by a state court in a covered jurisdiction which alter election procedures previously precleared by the Attorney General are subject to Section 5?

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No. 89-1564

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES E. POOLE, JR., et al., Appellants,

v.

EMMA GRESHAM, et al., Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16.1(c) Appellees move to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF FACTS

This is the second time this case has come before this Court. In the first appeal, the Court vacated the judgment of the three-judge court that certain voting changes

directed by a state court (including stopping the holding and scheduling of municipal elections) were subject to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and remanded for consideration of the question of mootness. Poole v. Gresham, ___ U.S. ___, 109 S.Ct. 523 (1988), J.S.App., p. A-3. Four of the Justices (Brennan, White, Marshall and Blackmun) stated they would affirm the judgment of the district court.[1]

Following a hearing on remand, the three-judge court held that the case was not moot and reinstated its prior order. J.S. App., p. A-1. The question presented in this second appeal as framed by Appellants is identical to that in the first appeal. J.S., p. i.

Appellees are black residents of

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1. The judgment, rather than the reported decision of the Court, is reproduced at J.S.App., p. A-3, and omits the statement of the four Justices that they would affirm.

Keysville, Georgia, a majority black municipality of approximately 300 people in rural Burke County. Although Keysville was chartered in 1890, prior to the election held on January 4, 1988, the town had not held an election or had any municipal officials since approximately 1933. The 1988 January election was conducted pursuant to the order of the three-judge court in this case, Gresham v. Harris, 695 F.Supp. 1179 (N.D.Ga. 1988), vacated and remanded sub nom., Poole v. Gresham, supra, J.S.App., pp. A-4 - A-17, and the Attorney General's preclearance of new election procedures under Section 5. A copy of the preclearance letter is appended hereto at 1a.

Restoration of elected government in Keysville has been a battle fought overtly on racial lines. Blacks have strongly supported restoration because of their need for municipal services, such as water and sewerage and police and fire protection. Whites have

adamantly opposed restoration because they do not wish to be governed by black elected officials or pay for municipal services. Whites have repeatedly argued that the municipal boundaries of the town were indeterminable and that as a consequence elections could not be held.[2]

In an attempt to restore city government Appellees and other black residents of Keysville organized a town meeting in 1985 and chose superintendents to conduct new elections. Appellants, who are white and are opposed to restoration of municipal government, filed a law suit, Poole v. Lodge, Civ.

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2. They contend that the location of the schoolhouse, which was designated as the center of town in the 1890 act of incorporation, Ga. Laws 1890-91, Volume II, p. 657, and which was destroyed many years ago in a storm, is presently unknown and that as a consequence it is impossible to establish the boundaries of the town and conduct elections. Whites have also resorted to scare tactics telling elderly blacks that if government were restored they would lose their homes and racial violence would result.

No. 85-V-414 (Sup. Ct. Burke Cty. Ga.), and secured an injunction against the elections until county officials complied with all requirements of state law, including determining the municipal boundaries of Keysville.

Appellees filed the instant law suit on April 29, 1987 seeking declaratory and injunctive relief against the Governor for failing to appoint persons to the vacant city offices pursuant to state law. Also in 1987, the Georgia General Assembly enacted a statute for the purpose of establishing a method of restoring municipal government to Keysville by providing that in the event all the offices of a municipality were vacant, "the election superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct...the special election." O.C.G.A. §36-30-13. The statute also authorized the board of registrars for the county to prepare a list of

electors for the election.

The Attorney General of Georgia advised the Secretary of State by letter in August, 1987, that the new law was mandatory and that the election superintendent of Burke County was required to call and conduct special elections for Keysville.

After Section 5 preclearance of §36-30-13, Appellees moved to amend their federal complaint to add county officials as defendants charging that they had failed to call elections for Keysville as required by the new statute. Following the filing of the motion to amend, the election superintendent of Burke County, pursuant to §36-30-13, called an election for Keysville for January 4, 1988.

The call and date for the election, together with a map designating the boundaries of the town to be used in determining voter eligibility, were prepared by county officials and submitted to the Attorney General pursuant

to Section 5 of the Voting Rights Act.[3] The submission was precleared on December 9, 1987. Appendix, p. 1a.

On December 3, 1987, the plaintiffs in Poole v. Lodge, supra (Appellants here), filed a motion in their state court law suit to enjoin the January election on the ground that the boundaries of the town were indetermined. The court granted the motion and on December 31, 1987 entered an order enjoining the Keysville elections and further enjoining county officials from "undertaking any actions with regard to the scheduling or conducting of

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3. The map was prepared by the county tax assessor based upon his review of various deeds and plats recorded in the county courthouse. J.S.App., pp. A-41 - A-43. The county board of registrars then used the map to prepare the list of eligible voters for the January elections. Id., p. A-44. In submitting the map for preclearance, the county attorney advised the Attorney General that while setting the town boundaries "has been one of the problems that has confronted the county...we now believe that the boundaries have been reasonably determined, and the election can go forward."

municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law." J.S.App., p. A-29. The court also held that its order "is not subject to Section 5 preclearance." Id.

Appellees then filed a motion in this case for a temporary restraining order and a preliminary injunction enjoining county officials from implementing any of the voting changes in the state court order absent preclearance under Section 5. The district court as a single-judge court allowed Appellants (plaintiffs in Poole v. Lodge, supra) to participate in the hearing and over their objections, but with the consent of the Attorney General of Georgia and Burke County officials, issued a temporary restraining order on December 31, 1987 permitting the elections to go forward. J.S.App., p. A-9.

On the day of the elections, Joseph Cochran, Sr. (who later contested the results

of the election along with Appellant Muns and others) and Hassie Cochran filed an action with the Burke County board of registrars and the superintendent of elections challenging the eligibility of 41 town electors on the ground that the boundaries of the town had not been determined and that the residency of the voters could not be established. The challenge was heard and dismissed. There was no appeal. J.S.App., p. A-48.

There were two slates of candidates in the elections, one favoring restoration of municipal government and having the support of black residents, and the other opposing restoration and having the support of white residents. Voting in the elections was sharply polarized on the basis of race. See, J.S.App., p. A-48, and Rogers v. Lodge, 458 U.S. 613, 623 (1982) (finding "overwhelming evidence of bloc voting along racial lines" in elections for the Burke County Commission). Appellee Gresham was elected mayor and Appel-

lees C. Neely, M. Holland, A. Lewis and Morris were elected as members of council. Appellant Poole, who had only write-in opposition, was elected as the fifth council member.

Immediately after the January elections, local whites, including Appellant Muns, filed a challenge to the results alleging that the boundaries of the town were indeterminable and that it was impossible to ascertain who was a qualified voter or candidate. The contest was denied and the state court affirmed the results of the election "based upon the map and voter's list as submitted by the Burke County Board of Registrars and precleared and approved by the United States Attorney General." In Re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke Cty. Ga.), J.S.App., p. A-52. The contestants did not appeal.

On January 14, 1988 the district court as

a three-judge court held a hearing on Appellees' motion for a preliminary injunction. The court granted the motion to intervene filed by Appellants and over their objections, but again with the consent of the Attorney General of Georgia and Burke County officials, granted preliminary injunctive relief. Thereafter, on June 30, 1988 the three-judge court granted permanent injunctive relief finding that the state court order "changed a previously precleared practice and therefore should also have been precleared." J.S.App., p. A-16. Appellants took their first appeal to this Court.

Appellees filed a motion to dismiss or affirm in which they argued, inter alia, that the appeal was moot in that both the Burke County board of registrars and the Superior Court of Burke County had issued intervening final judgments, based upon the Attorney General's preclearance, that the boundaries of Keysville had been legally determined for

purposes of conducting elections.

After remand from this Court in Poole v. Gresham, supra, for a determination of the mootness issue, the three-judge court, anticipating further litigation in the state court, concluded that the case was not moot.

> While it may be the effect of [Superior Court] Judge Grant's order and the decision of the Board of Registrars to fix the boundaries for the town of Keysville, it is not at all clear to us that [Superior Court] Judge Pickett will find that they have been 'properly delinated in accordance with the requirements of law.'....We conclude, therefore, that this controversy is not moot. (footnote omitted)
> J.S.App., p. A-1.

A regularly scheduled election was held for the mayor and council on January 2, 1989. New voting procedures used in the election (candidate qualifying period and fees, use of voting machines and use of the county registration list), as well as a municipal annexation, were submitted for preclearance and were approved by the Attorney General. Copies of the preclearance letters

are appended hereto at 4a and 7a.

Prior to the election, Joseph Cochran, Sr. and Hassie Cochran once again filed challenges to the eligibility of municipal voters. The board of registrars denied the challenges on January 2, 1989, concluding that:

> The boundaries of Keysville for purposes of conducting elections have been determined and the Board of Registrars is without authority to alter or vary those boundaries or any other election procedures which were submitted for preclearance by Burke County and Keysville officials and which were approved by the Attorney General under Section 5.

A copy of the order of the board of registrars is appended hereto at 9a.

Incumbents Gresham, Lewis, Holland, Morris and Neely were reelected. Ollie Mae Lane, also black, was elected to council Post 1. The defeated white candidates filed a challenge to the results, but have not prosecuted it.

The state has refused to seek implementation of the changes contained in the

superior court order by submitting them for Section 5 review. According to the Attorney General of Georgia, the "precleared boundaries are the current lawful boundaries of Keysville," while

> preclearance [of the voting changes directed in the state court order] ...would lead to a retrogression in the ability of the black citizens of Keysville to exercise their electoral franchise. In fact, the preclearance of the order would destroy the ability to exercise the franchise in its entirety....As such, the Attorney General cannot in good faith submit such a change for preclearance.
> In Re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988, supra, Motion for Reconsideration by the Attorney General

of Georgia, p. 3.[4]

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4. Since their election, the mayor and council have tried to govern Keysville - despite strong opposition by whites. In April, 1988 they adopted a license ordinance charging a small tax for conducting business in the town. The Keysville Convalescent and Nursing Center, Inc., which is owned and operated by Appellants Marshall and Harmon, filed suit against Keysville in state court on August 11, 1988 seeking a declaration that it was not required to pay a license fee or tax because it was impossible to tell if the nursing center was inside or outside the town's boundaries. See, Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. 88-V-280 (Sup. Ct. Burke Cty. Ga.). A second group of whites, including Appellants Poole, Muns, Way, Marshall and Harmon, filed another suit against Keysville on August 24, 1988 in state court seeking a declaration that the 1988 annexation was null and void because the boundaries of the town were indeterminable. See, Poole v. City of Keysville, Georgia, Civ. No. 88-V-293 (Sup. Ct. Burke Cty. Ga.). The city removed both cases to federal court where they are presently pending. See, Poole v. City of Keysville, Georgia, Civ. No. CV 188-184 (S.D.Ga.), and Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. CV 188-183 (S.D.Ga.).

ARGUMENT

I. The Questions Are Unsubstantial

It is undisputed that Appellants, a group of disgruntled whites who oppose the restoration of municipal government in Keysville, are the only parties contending that preclearance of the voting changes contained in the state court order is not required. J.S.App., p. A-12. The Attorney General of Georgia and the election officials of Burke County agree with Appellees that the new voting procedures at issue are subject to Section 5 review.

The arguments made by Appellants are exceedingly narrow and artificial. They do not dispute that Keysville is covered by Section 5 or that voting changes directed by state courts, including changes in the dates of elections, are subject to preclearance. J.S., pp. 12, 16, and J.S.App., p. A-11. Appellants' arguments are that the "delay" of an election is not a covered change, J.S., pp. 11-2, and that even if it were, the changes in

this case were incident to the enforcement of previously precleared state law and are therefore not subject to Section 5. J.S., p. 16.

Appellants' first contention is plainly incorrect. As the three-judge court found, "it is clear that the order did, at the least, change the date of the election, if not halt it altogether. A change in the date of an election...requires approval by the Attorney General under section 5. NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985)." J.S.App., p. A-12. Accord, Lucas v. Townsend, ___ U.S. ___, 108 S.Ct. 1763, 1765 (1988)(Kennedy, Circuit Justice).

Department of Justice regulations governing the administration of Section 5 also provide that changes in the time of holding elections are covered by the statute. See, 28 CFR §51.17(a)("The conduct of a special election...is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or

procedures to be followed.").[5]

Appellants' second contention, as the three-judge court found, is simply contrary to the prior decisions of this Court. In NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985), the Department of Justice precleared on November 19, 1982 a state statute calling for special elections for a county school board to be held at the time of the November general election. Following the belated preclearance, county officials set March 15, 1983 as a new date for the election. They contended, precisely as the Appellants do here, that "because the rescheduling [of the election] in this case

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5. Other voting changes in the state court order included altering or denying the authority of election superintendents to call elections and registrars to define the electorate and prepare voters' lists pursuant to O.C.G.A. §36-30-13, and ruling that the town boundaries could not be determined at all when county officials had concluded otherwise. J.S.App., p. A-15.

was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of § 5." 470 U.S. at 178, 180. This Court disagreed. It held that the disputed change was required to be precleared under Section 5. 470 U.S. at 181.

Appellants' reliance upon the district court's opinion in Williams v. Sclafani, 444 F.Supp 895 (S.D.N.Y. 1977) is misplaced. As the three-judge court noted here, the holding in Williams was based largely on the district court's conclusion that state court orders were exempt from Section 5 review. J.S.App., pp. A-14; 444 F.Supp. at 903-04. That holding was repudiated by Hathorn v. Lovorn, 457 U.S. 255 (1983), decided five years later.

Appellants concede that the setting of an election by the state court, even if undertaken to comply with previously precleared state law, would be a voting change required

to be precleared under Section 5. J.S., p. 16 ("Had the Superior Court's Order in this case dictated that all Keysville municipal elections would, thereafter, be held on a different date, that Order would be subject to preclearance."), and p. 12. Accord, 28 CFR §51.17(b)("Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement."). Appellants do not explain, however, why the setting of an election date should be covered by Section 5 while the alteration of the date, or the halting or delaying, of elections should not be covered by Section 5. Both have the potential for discrimination and for that reason both are covered by Section 5. NAACP v. Hampton County Election Commission, supra, 470 U.S. at 181. Also see, Hadnott v. Amos, 394 U.S. 358, 365-66 (1969)(rescheduling of a candidate quali-

fying period is a covered voting change).[6]

There is no basis in Section 5 jurisprudence for the artificial distinction argued for by the Appellants between the "delay" of an election and the change in the date of an election. As this Court has repeatedly stated, Section 5 must be given "the broadest possible scope" to reach any practice "which alter[s] the election law of a covered State in even a minor way." Allen v. State Board of Elections, 393 U.S. 544, 566-67 (1969); City of Pleasant Grove v. United States, ___ U.S. ___, 107 S.Ct. 794, 798 (1987). Also see, 28 CFR §51.12 (1987) (requiring the submission of any change in voting "even

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6. While the merits of the changes in question are not involved in this appeal, McCain v. Lybrand, 465 U.S. 236, 250 (1984), there is no doubt that they have the potential for discrimination. As the Attorney General of Georgia has noted, the effect of implementation of the new procedures would be to turn recently elected black officials out of office and disfranchise minority voters in Keysville.

though it appears to be minor or indirect").

This Court has consistently defined Section 5 broadly, stressing that the statute is not a mere inventory of voting procedures but is concerned with "the reality of changed practices as they affect Negro voters." Georgia v. United States, 411 U.S. 526, 531 (1973). Congress, expressly approving the broad definition of Section 5 adopted by this Court and the Attorney General, has extended the preclearance provisions of the Voting Rights Act on three different occasions, in 1970, 1975 and 1982. 84 Stat. 314; 89 Stat. 402; 96 Stat. 131; City of Pleasant Grove v. United States, supra, 107 S.Ct. at 798; Dougherty County, Ga. v. White, 439 U.S. 32, 38-9 (1978); S.Rep. No. 97-417, p. 9 (1982), U.S. Code & Admin. News 1982, p. 186.

Given the broad scope of Section 5, the settled case law and the legislative history of the statute, the question whether the voting changes at issue in this appeal are

subject to preclearance is so unsubstantial as not to warrant further argument.

II. The Fact that a Jurisdiction May Be in Violation of State Law Is not a Defense for Failing to Comply with Section 5

The fact that a covered jurisdiction may be in violation of state law is no basis for non-compliance with Section 5 when it seeks to implement a voting change. In Perkins v. Matthews, 400 U.S. 379 (1971), the City of Canton, Mississippi elected its aldermen by ward elections in violation of a 1962 state law that required aldermen to be elected at-large. At the elections in 1969, the city, in an effort to comply with state law, attempted to implement at-large elections. In an action by local voters and candidates to require preclearance of the at-large elections, the city argued that it had no other choice than to comply with the 1962 state law in the 1969 elections and that doing so was not a change in voting subject to Section 5. This Court

held that conducting at-large elections, even if district elections were in violation of state law, was a change in voting that could not be implemented without Section 5 pre-clearance. Accord, City of Lockhart v. United States, 460 U.S. 125, 132 (1983)(whether local officials were seeking to act in conformity with state law was "essentially irrelevant" in evaluating the effect of a voting change); Hathorn v. Lovorn, supra, 457 U.S. at 256, n. 16 ("§ 5 comes into play whenever a covered jurisdiction departs from an election procedure that was "in fact 'in force or effect'...on November 1, 1964." Perkins v. Matthews").

By analogy to Perkins, even if the elections in Keysville were in violation of state laws governing the location of municipal boundaries, or were in violation of a state court order, the county's failure to conduct the elections would still be a covered

change.[7] Such a result is compelled, not only by the decisions of this Court, but by the Supremacy Clause of Article VI of the Constitution.

Appellants complain that if the decision of the three-judge court were affirmed it would deprive state courts of the ability to enforce state election laws. J.S., pp. 12-

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7. The benchmark for determining a voting change is ordinarily the practice in force or effect on November 1, 1964. Perkins v. Matthews, supra, 400 U.S. at 395. As the three-judge court found, however, where intervening changes have been enacted and precleared they become the appropriate benchmark for determining voting changes and administering Section 5. J.S.App., p. A-13. Also see, Busbee v. Smith, 549 F.Supp 494, 498 (D.D.C. 1982)(voting change was a congressional reapportionment enacted in 1981 different from that enacted in 1972), aff'd, 459 U.S. 1166 (1983); Edge v. Sumter County School District, 775 F.2d 1509, 1512 (11th Cir. 1985)(a court should ordinarily reinstate "the last valid plan in effect" in fashioning a Section 5 remedy); NAACP, DeKalb County Chapter v. Georgia, 494 F.Supp. 668, 676 (N.D.Ga. 1980); 28 CFR §51.54(d)("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction").

3. To the contrary, states are always free to enforce their election laws, provided they do so in conformity with Section 5.

III. The Attorney General Can Evaluate the Changes Presented

Appellants argue that preclearance should not be required of the changes directed by the state court because they are not capable of being evaluated by the Attorney General or the United States District Court for the District of Columbia. J.S., p. 17. To demonstrate this alleged difficulty of evaluation, Appellants pick out four of the factors listed in the Section 5 regulations which the Attorney General may consider in resolving a submission, e.g., the extent to which minorities were consulted or whether their concerns were taken into account. J.S., pp. 17-8. The regulations, however, provide that the Attorney General should also consider, inter alia, the requirements of the

constitution and statutes designed to safeguard the right to vote and the relevant decisions of the Supreme Court and other federal courts. 28 CFR §§51.54 - 61. Not every factor identified in the regulations will be relevant in every case, but the Attorney General would surely be able to evaluate the purpose and effect of the changes involved in this appeal under existing Section 5 standards, which are far more extensive than Appellants have indicated.[8]

In addition, the Attorney General would not be required to "second guess" the state court judge. J.S., p. 18. The Attorney General considers only whether a voting change is free of racial purpose or effect in light

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8. Appellants concede, as they must, that the court ordered changes in Hathorn v. Lovorn, supra, would be "easy" to review under Section 5. J.S., p. 18. Their analysis fails to explain, however, why the changes involved here should be regarded any differently.

of applicable constitutional, statutory and decisional voting rights law. 28 CFR §51.51, et seq. By granting preclearance he does not certify that a submission "satisfies any other requirement of the law beyond Section 5." 28 CFR §51.49. The Attorney General is not, therefore, an appellate body reviewing the merits of state court orders, either under state law or non-Section 5 standards. The Attorney General in fact does not review state court orders as such, but only voting practices enacted or implemented by covered jurisdictions - including those directed by state courts.

The voting changes which county officials were directed to implement in this case can be easily evaluated by the Attorney General or the United States District Court for the District of Columbia under current Section 5 standards.

IV. There Is an Absence of any Conflict of Opinions

The decision of the three-judge court should be affirmed because there is an absence of any conflict between it and the decisions of this Court and lower federal courts.

Conclusion

The judgment sought to be reviewed on appeal should be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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WBR:MAP:JFZ:gmh
DJ 166-012-3
S6331
R1079
R3822-3825
S9822-9826

December 9, 1987

Preston B. Lewis, Jr., Esq.
Burke County Attorney
P. O. Box 62
Waynesboro, Georgia 30830

Dear Mr. Lewis:

This refers to the reestablishment of the Town of Keysville governed by a mayor and five councilmembers elected at large, with numbered positions and a majority vote requirement, to one-year concurrent terms with municipal elections held on the first Monday in January, the establishment of a polling place, and the procedures for conducting the January 4, 1988, special election for the town in Burke County, Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We recieved your initial submission on September 15, 1987; supplemental information was

received on November 10, November 20, and November 24, 1987. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: s/Mark A. Posner
For Gerald W. Jones
Chief, Voting Section

JPT:LLT:CEI:rac
DJ 166-012-3
Y0610-0611
Y1011-1012

December 29, 1988

Lewis Pitts, Esq.
Christic Institute South
P. O. Box 1105
Chapel Hill. North Carolina 27514

Dear Mr. Pitts:

This refers to the candidate qualifying period and fees, use of voting machines, and electing to use the county registration list for municipal elections in the Town of Keysville in Burke County, Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on December 7, 1988; supplemental information was received on December 8, 1988. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

The Attorney General does not interpose

any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely

James P. Turner
Acting Assistant
Attorney General
Civil Rights Division

By: s/Lora L. Tredway

for Barry H. Weinberg
Acting Chief,
Voting Section

cc: Laughlin McDonald, Esq.
ACLU Foundation, Inc.

Honorable E. R. Gresham
Mayor

JPT:LLT:CEI: rac
DJ 166-012-3
Y0880

December 29, 1988

Lewis Pitts, Esq.
Christic Institute South
P. O. Box 1105
Chapel Hill, North Carolina 27514

Dear Mr. Pitts:

This letter refers to the November 25, 1988 annexation to the Town of Keysville in Burke County, Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on December 19, 1988. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act

expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

James P. Turner
Acting Assistant
Attorney General
Civil Rights Division

By: s/Lora L. Tredway

for Barry H. Weinberg
Acting Chief
Voting Section

cc: Laughlin McDonald, Esq.
ACLU Foundation, Inc.

BOARD OF REGISTRARS
BURKE COUNTY, GEORGIA

IN RE: Challenge to Electors,
Keysville, Georgia

ORDER

These are challenges to the eligibility of certain electors at the January 2, 1989 election for the Mayor and City Council of Keysville (Burke County), Georgia on the grounds that such electors are not actual residents of Keysville. The Board of registrars has fully considered the challenge and makes the following findings and conclusions:

1. The challenged electors all reside within the boundaries of Keysville as previously precleared by the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, on December 9, 1987 and December 29, 1988.

2. The boundaries of Keysville for purposes of conducting elections have been determined and the Board of Registrars is

without authority to alter or vary those boundaries or any other election procedures which were submitted for preclearance by Burke County and Keysville officials and which were approved by the Attorney General under Section 5.

3. A challenge to electors virtually identical to this one was previously presented to and rejected by this Board in connection with the municipal election in January 4, 1988. Application to Burke County Board of Registrars and to the Elections Superintendent of the Board of Elections of Burke County, Georgia Challenging Certain Electors, Transcript of Meeting to consider Challenges in Regard to Municipal Election Held on Monday, January 4, 1988 at 7:13 P.M. at Heritage House, Keysville, Georgia, p. 11. The challenges here have presented no new or different evidence from that previously considered and rejected by this Board as a valid basis for challenging any elector.

4. A chllenge was filed to the results of the election held on January 4, 1988 on grounds virtually identical to those in the instant case, that the boundaries of Keysville were indeterminable and that it was impossible to ascertain who was a qualified voter or candidate. The contest was denied and the Supreme Court affirmed the results of the election "based upon the map and voters' list as submitted by the Burke County Board of Registrars and precleared and approved by the United States Attorney General." In Re: Contest of Election Results of the Keysville Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke County, Ga. May 12, 1988).

5. For the above and foregoing reasons, the challenges are without merit and are denied.

This 2nd day of January, 1989.

s/

Board of Registrars
Burke County, Georgia